Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HAROLD COX; SHIRLEY DAVIDSON; ROBERT STUBBLEFIELD; CYNTHIA HERRING; ELOISE EDWARDS; BETTY CURLEY; LEO EASTER, PETITIONERS

v.

CITY OF DALLAS TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether black homeowners are denied the protection of an aggrieved persons claim under the Fair Housing Act, 42 U.S.C. § 3604, solely because they already own their homes where they allege their homes have been made ineligible for sale because of the conditions created by the City's racially discriminatory provision of zoning enforcement and other municipal services?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit (Pet. App. 1a-35a) is reported at 430 F. 3d 734. The opinions of the U.S. Magistrate Judge (Pet. App. 36a - 71a [district court findings and conclusions]; Pet. App. 72a-101a [district court summary judgment opinion]) are unreported in the Federal Supplement but are in the WestLaw reports at *Cox v. City of Dallas*, 2004 WL 2108253 (N.D. Tex. 2004) and *Cox v. City of Dallas*, 2004 WL 370242 (N.D. Tex. 2004).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on November 9, 2005. A petition for rehearing en banc was denied on December 23, 2005. Pet. App. 102a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

1. Section 3602 of Title 42 of the United States Code provides, in part:

> As used in this subchapter—
>
> . . .
>
> **(f)** "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.
>
> . . .
>
> **(i)** "Aggrieved person" includes any person who-

(1) claims to have been injured by a discriminatory housing practice; or
(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

. . .

2. Section 3604 of Title 42 of the United States Code provides, in part:

It shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin. 42 U.S.C.§ 3604.

3. Section 3613(a)(1)(A) of Title 42 of the United States Code provides:

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2

> years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

The provisions of 42 U.S.C. § 3616(a) (Pet. App. 103a), 24 C.F.R. § 100.70 (Pet. App. 115a), and 24 C.F.R. §125.401 (Pet. App. 114a) are set out in the appendix at the pages cited.

STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 3613(a)(1)(A).

Petitioners are black homeowners who purchased their homes in their Dallas, Texas neighborhood in the 1970s. The neighborhood was predominantly white in 1970 and predominantly black by 1980. The illegal landfill in their neighborhood began operation in 1982 after petitioners had purchased their homes and after the neighborhood had become predominantly black. Pet. App. 75a. The illegal landfill covered 85 acres and operated for 15 years until 1997. Pet. App. 2a, 61a - 62a. The landfill caught fire and burned for seven months in 1988. Pet. App. 5a. The landfill again caught fire and burned for three months in 1997. Pet. App. 8a.

The summary judgment evidence showed that the zoning for the site did not permit the use of the site as a landfill. Pet. App. 60a. The City issued Certificates of Occupancy to the owners of the illegal landfill which

were based on applications clearing stating the owners' intent to fill the landfill with solid waste. The City was aware of the illegal landfill. City contractors used the site to dispose of demolition waste. The City's efforts to terminate the use of the illegal landfill were sporadic and ineffective. Pet. App. 94a. Petitioners identified two similarly situated sites located in predominantly white neighborhoods. In those white areas, the City remedied illegal dumping and/or mining. Pet. App. 95a. Petitioners' summary judgment evidence was sufficient to raise an issue of fact on the discriminatory effects of the City's actions. Pet. App. 96a.

The lawsuit originally involved two separate sets of claims, one set involving the Resource Conservation and Recovery Act [RCRA], 42 U.S.C. § 6972, allegations and the second involving allegations of racial discrimination. Pet. App. 80a - 81a. The RCRA claims were tried first. The district court found that the City of Dallas had violated 42 U.S.C. § 6972 by contracting with demolition contractors that disposed of City generated demolition debris at the illegal landfill adjacent to petitioners' homes. The district court ordered the City to eliminate the conditions that were a substantial endangerment to the environment, health, and safety. The Court of Appeals for the Fifth Circuit upheld the district court's judgment on the RCRA claim finding that the illegal landfill had caused pollution, was an ongoing fire hazard, was open to the public, posed a risk of further contamination, and that the City had played a role in the creation of the dangers to the adjoining neighborhood. *Cox v. City of Dallas*, 256 F. 3d 281, 285, 300 (5th Cir. 2001).

Subsequently the race discrimination claims were assigned to a U.S. Magistrate Judge for trial. Pet. App. 81a.

Plaintiffs' Fourth Amended Complaint Revised contained the following allegations that the City was implementing a race neutral policy with racially discriminatory effects:

> 73. The City of Dallas implemented a policy that allowed the dumping of demolition debris, including wood, shingles, and other biodegradeable material at illegal landfills by City demolition contractors. The racially discriminatory effect of this City policy is that the illegal landfills used are disproportionately located in minority areas. Pet. App. 117a.
>
> . . .
>
> 75. From 1980 through 1996, the City of Dallas City Council approved demolition contracts with contractors who were using persons or companies to dump demolition debris from City demolitions at the Deepwood site, and at other illegal landfills located in predominantly or majority minority, usually African American, neighborhoods. Pet. App. 117a.

Petitioners alleged specific facts showing that the City's actions directly affected the availability of dwellings and were connected to the sale of dwellings.

> 88. The City's actions directly affect the availability of the existing dwelling units in plaintiffs' neighborhoods by interfering with the owners' ability to make the dwelling units available to others by selling the dwelling units. The illegal dumping and the presence of the Deepwood site subject plaintiffs to a form of mortgage redlining whereby their ability to

> make their dwellings available for sale is decreased. For example, Federal Housing Administration (FHA) mortgage appraisal guidelines require the appraiser to identify all inharmonious land uses that present a serious detriment to either the health or safety of the occupants or to the economic security of the property, note such detriments, and recommend that the property be rejected by the lender. Adjoining or nearby hazards such as chemical fumes, odors that are hazardous to the health of neighborhood occupants and adversely affect the market value of the property require the appraiser to return the unfinished appraisal to the lender. Without a finished appraisal, the loan cannot be approved. Pet. App. 122a - 123a.

Petitioners also alleged purposeful violations of the Fair Housing Act, 42 U.S.C. § 3604(a) and § 3604(b), the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. §1981. Petitioners sought damages under all of their claims. Pet. App. 81a.

The City moved for summary judgment on all of the Fair Housing Act claims solely on the grounds that since petitioners had already purchased their homes before the alleged policy began, the City could not have made their homes unavailable to them or discriminated against them in the provision of services related to the earlier acquisition of their homes. Pet. App. 84a.

The district court found that the summary judgment evidence raised an issue of fact on the discriminatory effects of the City's actions. Pet. App. 95a - 96a. Nevertheless, the district court granted the motion on the Fair Housing Act claims for the sole

reason that since petitioners already owned their homes, the City had not made petitioners' homes unavailable to petitioners. Therefore, according the district court, the petitioners did not state a claim for relief under the Fair Housing Act.

> To affect the availability of housing within the meaning of the FHA, the discriminatory actions must have a direct impact on plaintiffs' ability, as potential home buyers or renters, to locate in a particular area or to secure housing. Pet. App. 84a.
>
> . . .
>
> In this case, it is undisputed that Plaintiffs own the homes in which they live. (*See* Pl.'s MSJ Br. at 2.) Plaintiffs do not allege that the City has refused to sell or rent to them after the making of a bona fide offer, or has refused to negotiate for the sale or rental of a dwelling to them for any discriminatory reasons. They claim that illegal dumping at the Deepwood site decreased the habitability of their homes and made their homes harder to sell. (*Id.* at 9-10.) Pet. App. 85a.
>
> To recover under §§ 3604(a), Plaintiffs must prove that the City has made unavailable or denied them dwellings on a prohibited basis. Section 3604(a) protects the right of individuals to live where they choose, but it does not protect intangible interests in already-owned property, such as habitability or value. *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d at 1210; *see also Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192-93 (4th Cir.1999). Because no reasonable trier of fact could find that the City

> made unavailable or denied a dwelling to Plaintiffs within the meaning of the FHA, the City is entitled to summary judgment with respect to Plaintiffs' claims under §§ 3604(a) Pet. App. 85a-86a.
>
> . . .
>
> Accordingly, the Court holds that §§ 3604(b) applies only to discrimination in the provision of services that precludes the sale or rental of housing. Because Plaintiffs here have not alleged discrimination related to the acquisition of their homes, the City is entitled to summary judgment on Plaintiffs' claims brought under §§ 3604(b). Pet. App. 89a.
>
> . . .
>
> This Court has previously held that because Plaintiffs own their homes and no reasonable trier of fact could find that the City made unavailable or denied a dwelling to them within the meaning of the FHA, the City is entitled to summary judgment with respect to their claims brought under §§ 3604(a) and (b) of the FHA. Pet. App. 91a.

The summary judgment on the Fair Housing Act claims prevented petitioners from obtaining a trial on those claims. As pointed out by the Court of Appeals, trial of the Fair Housing Act claims would have proceeded under both a *respondeat superior* standard and a discriminatory effects test liability standard. In their Fair Housing Act proof, petitioners would not have had the burden to show either discriminatory purpose or direct involvement of the City of Dallas City Council or other policymakers. Pet. App. 17a. The district court later ruled against petitioners' on their

purposeful discrimination claims after a trial on the merits. Pet. App. 36a. The district court ruled that petitioners had not shown either a discriminatory purpose nor the direct involvement of the City Council or Board of Adjustment in the policy at issue. Pet. App. 62a-63a, 69a. The Court of Appeals affirmed these findings. Pet. App. 22a.[1]

The Court of Appeals affirmed the summary judgment on the Fair Housing Act claims on the grounds that the injuries asserted by petitioners, the barriers to the sale of their homes and the accompanying diminution in value, were not injuries prohibited by the Fair Housing Act.

> Plaintiffs argue that the City violated § 3604(a) because the dump makes it more difficult for them to sell their houses and lowers the value of their houses. This claim enjoys factual support, but it is not a claim of "unavailability" or "denial" of housing under a proper reading of the FHA. Pet. App. 10a-11a.
>
> The failure of the City to police the Deepwood landfill may have harmed the housing market, decreased home values, or adversely impacted homeowner; "intangible interests," but such results do not make dwellings "unavailable" within the meaning of the Act. Pet. App. 11a.
>
> . . . These cases buttress our conclusion that the simple language of § 3604(a) does not apply to

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[1] The disposition of petitioners' purposeful discrimination claims under the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1981 is not the subject for which review is sought because that disposition involved fact determinations by the district court and the Court of Appeals.

current homeowners whose complaint is that the value or habitability of their houses has decreased because such a complaint is not about "availability." Pet. App. 13a.

. . .

We hold only that § 3604(a) gives no right of action to current owners claiming that the value or habitability of their property has decreased due to discrimination in the delivery of protective city services. Pet. App. 14a.

. . .

Because housing was not made "unavailable" to plaintiffs, the district court's rejection of their § 3604 (a) claim was proper. Pet. App. 16a.

. . .

Even assuming that the enforcement of zoning laws alleged here is a "service," we hold that § 3604(b) is inapplicable here because the service was not "connected" to the sale or rental of a dwelling as the statute requires. Pet. App. 17a.

. . .

The claims here do not assert the requisite connection between the alleged discrimination and the sale or rental of a dwelling - that is § 3604(b) does not aid plaintiffs, whose complaint is that the value or "habitability" of their houses has decreased. Pet. App. 18a.

The Court of Appeals made it clear that its 42 U.S.C. § 3604(b) ruling was premised directly on petitioners' status as existing homeowners. This is clear from the Court of Appeals' statement when it added two possible exceptions to its rule that no existing homeowners have a 42 U.S.C. § 3604(b) claim.

> This is not to say that § 3604(b) applies only if the plaintiff was precluded from finding housing. For example, § 3604(b) may encompass a claim of a current owner or renter for attempted and unsuccessful discrimination relating to the initial sale or rental or for actual or constructive eviction. Pet. App. 18a.

These narrow exceptions do not extend Fair Housing Act protection to homeowners whose ability to sell has been blocked or impeded by the discriminatory provision of municipal services connected to the sale of dwellings. Nor does it recognize Fair Housing claims in which discrimination results in economic loss or damage to intangible interests of a home owner.

REASONS FOR GRANTING THE PETITION

The judgments below directly and unequivocally contradict this Court's decisions holding that 42 U.S.C. § 3604 provides a statutory claim for those who already occupy their dwelling units but whose economic or intangible interests are injured by actions making dwellings unavailable to others because of race. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-376 (1982). In this case, it was petitioners' own homes that were being made unavailable to others because of the City's racially discriminatory policy that caused and maintained the existence of the illegal landfill in their neighborhood.

The judgments below directly conflict with the decisions of other Circuits that explicitly cite the

Trafficante-Bellwood-Havens Realty precedent and hold that owners and tenants indirectly injured by practices alleged to make housing unavailable on prohibited grounds do have aggrieved person claims under 42 U.S.C. § 3604.

The judgments below directly affect not just the interests of petitioners and other homeowners but also the interests of fair housing organizations throughout the country. These organizations, while not themselves refused the right to purchase or rent a dwelling, do have indirect injuries that state an aggrieved person claim for relief under this Court's precedent and the Court of Appeals' cases following that precedent. *Havens Realty* 455 U.S. at 378 - 379; *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1094 - 1095 (7th Cir. 1992). The lower court opinions eliminate these claims by fair housing organizations by eliminating indirect injury as an element of a 42 U.S.C. § 3604 claim for relief.

1. The judgments below directly and unequivocally contradict this Court's decisions holding that 42 U.S.C. § 3604 provides a statutory claim for relief to existing homeowners whose economic or intangible interests are injured by actions making dwellings unavailable to others because of race.

The Fair Housing Act specifically sets out the definition of persons who have a claim for relief to seek damages and other remedies for violations of that Act. The Act gives "aggrieved persons" a claim for relief under its provisions.

> An aggrieved person may commence a civil action in an appropriate United States district court or State court . . . to obtain appropriate relief with respect to such discriminatory

housing practice . . . . 42 U.S.C. § 3613(a)(1)(A).

An "aggrieved person" is any person who "claims to have been injured by a discriminatory housing practice" or who believes that they "will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3601(i).

A "discriminatory housing practice" means an act that is unlawful under 42 U.S.C. § § 3604, 3605, 3606, or 3617. 42 U.S.C. § 3601(f).

The relevant provisions of 42 U.S.C. § 3604 state:

> It shall be unlawful--
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or **otherwise make unavailable** or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, **or in the provision of services or facilities in connection therewith**, because of race, color, religion, sex, familial status, or national origin. 42 U.S.C.§ 3604. (Emphasis added).

The U.S. Department of Housing and Urban Development (HUD) interprets 42 U.S.C. § 3604 to prohibit the provision of municipal services in a manner that makes dwellings unavailable because of race. The relevant provisions of the HUD regulations state:

> b) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or

> national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons
>
> . . .
>
> (d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:
>
> . . .
>
> (4) **Refusing to provide municipal services** or property or hazard insurance for dwellings **or providing such services** or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin. 24 C.F.R. § 100.70(d)(4)(Emphasis added).[2]

The HUD interpretation on the scope of the Fair Housing Act's prohibitions is entitled to deference and great weight. *Meyer v. Holley*, 537 U.S. 280, 287 (2003); *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F. 3d 1351, 1360 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996).[3] The Court of Appeals' decision in this case accepted the rule that municipal services making dwellings unavailable could be a discriminatory housing practice and cited the cases so holding. Pet. App. 30a

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[2] HUD's statements that discriminatory municipal services that affect the availability of housing are within the scope of discriminatory housing practices are at 54 Fed. Reg. 3232, 3240, January 23, 1989 and 53 Fed. Reg. 44992, 44997, November 7, 1988.

[3] The discriminatory housing practice at issue in *Cisneros* was the cancellation of homeowners' insurance to complainants already owning their homes. The Court of Appeals for the Sixth Circuit rejected the argument that since the cancellation had not made the homes unavailable to the owners, the action was not covered by 42 U.S.C. § 3604. *Cisneros*, 52 F. 3d at 1354-1355, 1357.

n34. The Court of Appeals in this case did not dispute the HUD interpretation that municipal services were covered by the Fair Housing Act but rather held that the language in 24 C.F.R. § 100.70(d)(4) supported the court's view that such conduct was illegal only when challenged by buyers rather than by those who already owned their homes. Pet. App. 28a-29a n30.

Neither of the lower courts in this case ruled that the City's actions did not make housing unavailable by rendering the homes in the neighborhood ineligible for purchase money mortgages. The Court of Appeals explicitly found that the proof supported petitioners' allegations that the City's actions had made their homes more difficult to sell. Pet. App. 10a-11a. It affirmed the dismissal of petitioners' claims on the grounds that this evidence and other evidence of the effect of the City's actions on the housing market was irrelevant because petitioners themselves had already acquired their homes before the illegal landfill began operation. Pet. App. 11a.

Rather than hold that the City's actions had not made housing unavailable, both lower courts focused on the injuries asserted by petitioners for the basis for dismissing the claims. Those injuries were not the direct injury of being denied the opportunity to purchase but rather the injury of being denied the opportunity to sell because of race and the accompanying loss of property value. Both courts held that since these injuries were not the subject of specific prohibitions in the Act, petitioners had no claim. Pet. App. 11a, 85a.

The lower courts looked in the wrong place for the actionable injury. Some of the injuries from discriminatory housing practices can be directly deduced from the wording of the practices prohibited.

A discriminatory refusal to rent inflicts the direct injury of being denied a dwelling unit to rent. However, the text of the Act does not state, describe, or limit the injuries that will satisfy the "have been injured" or "will be injured" provisions of the sections defining the persons with a claim for relief under the Act. 42 U.S.C. §§ 3601, 3613. Nor has HUD defined the injuries that establish the aggrieved person claim for relief. 24 C.F.R. Part 100.

It is this Court that has supplied the answer to the question of what type of injury satisfies the claim for relief section of the Fair Housing Act. The answer is that, in addition to the direct injury that results from a discriminatory housing practice such as being refused the opportunity to buy a dwelling because of race, any injury that satisfies the case or controversy requirement of Article III of the U.S. Constitution and is caused by a discriminatory housing practice satisfies the aggrieved person requirement for stating a claim for relief under 42 U.S.C. § 3604.

This Court first held that any such injury that satisfies the Article III case or controversy standard is sufficient for an aggrieved person Fair Housing Act claim in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972). In *Trafficante*, whites who were existing tenants at an apartment complex claimed that the landlord was refusing to rent to black applicants. The white tenants, whose dwellings clearly had not been made unavailable to them, asserted that their intangible interests in a racially integrated apartment complex were injured by discriminatory housing practices. This Court held that the alleged injury to the intangible interests associated with racially integrated housing satisfied the case or controversy requirement. No more was required to bring the existing tenants

within the statutory definition of aggrieved persons stating a Fair Housing Act claim. *Id.* at 212. The lower court decisions overturned by this Court in *Trafficante* had held that since the petitioners had not themselves been denied the rental of a unit because of race, they were not the direct objects of a discriminatory housing practice and thus were not aggrieved persons for purposes of stating a Fair Housing Act claim. *Trafficante v. Metropolitan Life Ins. Co.*, 322 F.Supp. 352, 353 (N.D. Cal. 1971); *Trafficante v. Metropolitan Life Ins. Co.*, 446 F.2d 1158, 1162 (9th Cir. 1971). The lower court decisions at issue in this petition are based on the same rule rejected by this Court in *Trafficante*, 409 U.S. at 212.

This Court, in a subsequent case, applied the aggrieved person standard to hold that existing homeowners who claimed that their property values were being diminished had stated an aggrieved person claim for relief under the Fair Housing Act. *Bellwood*, 441 U.S. at 103 n.9, 109, 115. The *Bellwood* homeowners alleged that their injury was inflicted by the defendants' discriminatory housing practices steering black potential home buyers to the petitioners' neighborhood while steering white potential home buyers to other neighborhoods. The Court did not decide whether or not this was a discriminatory housing practice. *Id.* at 115 n32. The Court did decide that the economic and other injuries alleged by the homeowners stated an an aggrieved persons Fair Housing Act claim. *Id.* at 109, 115. This is the same injury rejected by the lower courts in this case as sufficient to support a Fair Housing Act claim. Pet. App. 10a, 18a, 85a.

Neither the *Trafficante* plaintiffs nor the *Bellwood* plaintiffs would have survived the test for

stating an aggrieved person claim applied by the lower courts in this case. The intangible interests in an integrated community at issue in *Trafficante* are not listed in the Fair Housing Act, 42 U.S.C. § 3604. The economic and other injuries caused by the manipulation of the housing market in *Bellwood* are not injuries listed in the Fair Housing Act, 42 U.S.C. § 3604. Neither the *Trafficante* nor the *Bellwood* plaintiffs could show that they themselves had been denied a dwelling by the challenged practices. They had not. *Trafficante*, 409 U.S. at 206. But since this Court found that the injuries satisfied both the aggrieved person statutory test and the Article III case or controversy injury test, those plaintiffs stated aggrieved person claims under the Fair Housing Act. *Trafficante*, 409 U.S. at 208, 212; *Bellwood*, 441 U.S. at 103 n9, 109, 115.

This Court subsequently reaffirmed its aggrieved person claim holding and extended the scope of those with an aggrieved person claim for relief to fair housing organizations alleging indirect injuries from discriminatory practices. *Havens Realty Corp v. Coleman*, 455 U.S. 363 (1982). The Court re-affirmed its prior holding that residents alleging the loss of social, professional, and economic benefits from the discriminatory housing practices affecting not their ability to buy or rent but the opportunities of others were aggrieved persons for purposes of stating a 42 U.S.C. § 3604 claim. *Id.* at 376 - 77. The Court went on to rule that a local fair housing organization that was neither a prospective buyer or renter nor an existing homeowner could state an aggrieved person claim for relief. The fair housing organization could not allege that it had been denied the opportunity to buy or rent. Instead it alleged that the discriminatory housing practices perceptibly impaired its ability to provide

counseling and referral services for low-and moderate income homeseekers. The Court held that with this injury the organization could satisfy the required aggrieved person status for stating a claim under the Act. *Id.* at 378-379. Neither the existing homeowners nor the fair housing organization in *Havens Realty Corp.* would have satisfied the direct injury restriction on the aggrieved person claim for relief imposed by the lower courts in this case.

The Court of Appeals in this case made no effort to reconcile its holding with this Court's *Trafficante*, *Bellwood*, and *Havens Realty* precedent on the injury element of the statutory aggrieved person claim for relief established by the Act, 42 U.S.C. § 3613(a)(1)(A). The court cites *Bellwood* in a footnote listing it as a "non-controlling" case because it deals with situations where current owners are suing because houses have been made unavailable to others. Pet. App. 24a - 25a, n18. This is inexplicable. Petitioners directly claimed that the City's practices made their dwellings unavailable to others, at least to others seeking to use Federal Home Administration mortgages. Pet. App. 122a - 123a. The court found that the proof supported petitioners' claim that the City's actions made their homes harder to sell. Pet. App. 10a - 11a. *Bellwood* directly controls this case. The dismissive footnote does not eliminate the contradiction between the Court of Appeals and this Court's precedent.

2. The lower courts' judgments that because petitioners were not denied the right to purchase or lease their homes they do not have an aggrieved person claim under 42 U.S.C. § 3604 directly conflict with the decisions in other circuits that have followed this Court's precedent for determining aggrieved person claims in *Trafficante*, *Bellwood*, and *Havens Realty*.

The black homeowners challenging zoning actions in *Fair Housing in Huntington Committee Inc. v. Town of Huntington*, 316 F.3d 357, 362 - 63 (2d Cir. 2003) stated an aggrieved person claim. Local homeowners stated an aggrieved persons claim for religious discrimination in zoning that made dwellings unavailable to others of their religion. *LeBlanc-Sternberg v. Fletcher* 67 F.3d 412, 424 - 25, 428 (2d Cir. 1995), *cert. denied*, 520 U.S. 1263 (1997). A homeowner stated an aggrieved person claim for familial status discrimination against potential buyers in *Hamad v. Woodcrest Condominium Ass'n*, 328 F.3d 224, 230 - 32 (6th Cir. 2003) on a mere showing that the number of potential buyers had been reduced by the discriminatory conduct, not that they had been foreclosed from selling. *Id.* at 230. An existing homeowner denied homeowners' insurance stated an aggrieved person claim in *United Farm Bureau Mut. Ins. Co., Inc. v. Metropolitan Human Relations Com'n*, 24 F.3d 1008, 1010, 1015 -1016 (7th Cir. 1994). A tenant claiming associational and other injuries from steering stated an aggrieved person claim in *Harris v. Itzhaki*,183 F.3d 1043, 1049 - 50 (9th Cir. 1999). The owners of a building they sought to sell for use as dwellings stated an aggrieved person claim in *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 - 76 (9th Cir. 1998). A public housing tenant residing next to the site of proposed project to be built in black neighborhood stated an aggrieved person claim in *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1539 - 40 (11th Cir. 1994).

The cases cited by the lower courts in this case for the proposition that existing property owners do not have an aggrieved person claim either do not cite, discuss or follow the *Trafficante*, *Bellwood*, or *Havens*

Realty aggrieved person claim for relief precedent. *Southend Neighborhood Imp. Ass'n v. St. Clair County*, 743 F.2d 1207, 1209 - 10 (7th Cir.1984) cites *Trafficante* once but only for the general principle that courts have broadly applied the Fair Housing Act. The assertion that the Act does not protect the intangible interests in the already-owned property raised by the plaintiffs' allegations is made without any reference to the *Trafficante-Bellwood-Havens Realty* precedent. *Southend*, 743 F. 2d at 1210. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), *cert. denied*, 539 U.S. 942 (2003) does not include any discussion of or cites to the *Trafficante-Bellwood-Havens Realty* precedent. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 328-329 (7th Cir. 2004) mentions *Trafficante* but avoids its impact by claiming that the applicability of the Fair Housing Act to post-sale discrimination was not an issue in that case. The court in *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 - 193 (4th Cir. 1999) did not discuss injury.

The district court opinion in this case has already begun to contribute to additional splits in decisions. In *King v. Metcalf 56 Homes Ass'n*, WL 2538379, *2-3 (D. Kan. 2004), the district court cited the district court opinion in this case as support for the holding that 42 U.S.C. § 3604 does not apply unless the plaintiff alleges that the conduct prevented her from acquiring the dwelling. The district court in *King* dismissed the 42 U.S.C. § 3604 claim on the same grounds as the lower courts in this case - the plaintiff had already acquired the housing. The *King* court does not discuss or mention the *Trafficante* or *Bellwood* precedent. *Id.* The district court decision in this case was also cited as precedent for the same proposition in at least one case

in which the United States was seeking damages on behalf of individual aggrieved persons. The district court in that case rejected the proposition and held that an aggrieved person claim for relief can be based on indirect injuries. *U.S. v. Koch*, 352 F.Supp.2d 970, 972 (D. Neb. 2004).

3. Following *Havens*' recognition of the role of local fair housing organizations in seeking relief as an aggrieved person on their own behalf, these organizations have used the aggrieved person claim for relief recognized by this Court to enforce the provisions of the Fair Housing Act. *City of Chicago*, 982 F.2d at 1094 -1095; *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *Walker v. Todd Village, LLC*, 2006 WL 618812, *1 (D.Md. 2006). Recognizing the integral role that these fair housing organizations play in the private enforcement of the Fair Housing Act, the U.S. Congress passed and funded a program to provide a national system of such fair housing organizations. 42 U.S.C. § 3616(a), Pet. App. 103a; 24 C.F.R. §125.401, Pet. App. 114a. But the rule providing a 42 U.S.C. § 3604 aggrieved person claim for relief only to direct victims of a refusal to sell or rent set by the lower courts in this case will substantially impair the functioning of this Congressionally recognized and funded fair housing enforcement mechanism. Douglas, "Standing on Shaky Ground: Standing Under the Fair Housing Act," 34 Akron L. Rev. 613, 634 (2001); Schwemm, "The Fair Housing Act After Twenty Years," 6 Yale Law and Policy Review 375, 381-382 (1988). These organizations, like petitioners, have not themselves been denied the opportunity to buy or rent a dwelling. But these organizations, like petitioners, have suffered indirect injuries that provide them with an aggrieved person claim for relief under 42 U.S.C. §

3604. *Havens*, 455 U.S. at 378-379. If the lower courts' decisions are allowed to stand, there will be significant precedential barriers to the functioning of these organizations as part of the national system for private enforcement of the Fair Housing Act.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 04-11304
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HAROLD COX; SHIRLEY DAVIDSON; ROBERT STUBBLEFIELD; CYNTHIA HERRING; ELOISE EDWARDS; BETTY CURLEY; LEO EASTER,
Plaintiffs-Appellants,

Versus

CITY OF DALLAS TEXAS; ET AL,
Defendants,

CITY OF DALLAS TEXAS,
Defendant-Appellee.

November 9, 2005, Filed

COUNSEL: For HAROLD COX, SHIRLEY DAVIDSON, ROBERT STUBBLEFIELD, CYNTHIA HERRING, ELOISE EDWARDS, BETTY CURLEY, LEO EASTER, Plaintiffs - Appellants: Michael M Daniel, Laura Beth Beshara, Dallas TX.

For CITY OF DALLAS TEXAS, Defendant - Appellee: Janice Smith Moss, Assistant City Attorney, Caroline Jordan, City Attorney's Office for the City of Dallas, Dallas, TX.

For BAZELON CENTER FOR MENTAL HEALTH LAW, FAIR HOUSING ACTION CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS

UNDER LAW, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL FAIR HOUSING ALLIANCE, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, Amicus Curiae: Reed N Colfax, Relman & Associates, Washington, DC; Denise L Gilman, Washington Lawyers' Committee for Civil Rights, Washington, DC.

JUDGES: Before HIGGINBOTHAM, JONES and DeMOSS, Circuit Judges.

OPINIONBY: PATRICK E. HIGGINBOTHAM

OPINION: PATRICK E. HIGGINBOTHAM, Circuit Judge:

Asserting racial discrimination, homeowners sued the City of Dallas under the Fair Housing Act and 42 U.S.C. §§ 1981 and 1983 for persistent failure to police the operation of an illegal dump near their homes. The district court granted summary judgment to the City on the Fair Housing Act claim and ruled for the City on the §§ 1981 and 1983 claims after a bench trial. We affirm.

I

The City annexed the Deepwood neighborhood in 1956 and zoned it residential. In 1963, the City issued a certificate of occupancy for a gravel pit, part of a sand and gravel mining operation, at 523 Deepwood Street. The pit required a certificate because it was a non-conforming use. The City also re-zoned as industrial a portion of the 85-acre site and issued a specific use permit for a mining operation.

Plaintiffs purchased homes in Deepwood between 1970 and 1978. It was a predominately white neighborhood according to the 1970 U.S. Census. By the 1980 Census, it was predominately black. During the early years of this decade of racial transition, there was open dumping of solid waste at the site, prompting visits to the site by City and state officials. Their response was a call for continuing surveillance.

Terry Van Sickle owned V.V. Construction. He also owned the site from 1982 through 1992. In March of 1982, V.V. Construction applied for a permit to remove sand and gravel from the site, assuring the City that it would fill the old pits with solid waste. The permit was issued the following month.

Within six months, one of the plaintiffs in this action filed a complaint with the City, alleging massive illegal dumping at the site. The City responded that Van Sickle had been cited for improperly conducting a sanitary landfill operation in a residentially zoned area. Weekly re-inspections followed but, as late as December 9, 1982, had detected no additional illegal dumping. Plaintiffs had a different take. They continued to complain at City Council meetings about dumping. In the first four months of 1983, residents appeared five times at City Council meetings, each time expressing concern about the site; in particular, they voiced concerns about truck traffic, noise, air pollution, and illegal dumping.

On February 4, 1983, responding to these complaints, the Assistant City Manager advised the mayor and the City Council that Van Sickle had been fined for operating a sanitary landfill on the site and that illegal

dumping had ceased. The manager offered the view that once truck traffic to the site was diverted away from residential streets, most of the residents' concerns would be resolved. That did not prove to be accurate. Complaints by residents of Deepwood continued, as did the efforts of staff to reassure the elected officials. On May 18, 1983, a City employee sent a memo to a City Councilwoman describing the site and indicating that no contaminants were found in the soil or water table and that continued monitoring was to take place every four to six months for five years. Again, despite these assurances, residents continued to complain that trash was being dumped at the site.

The City Council remained attentive, if ineffectual, requesting that the Board of Adjustment hold a public hearing to consider terminating the nonconforming use of the site. The resolution requesting the hearing pointed to the operation of a "stone, sand, or gravel mining use" on the property. It did not mention the complaints that it was being used as an illegal dump.

The Board of Adjustment held the requested hearing on July 26, 1983 to consider revoking the certificate of occupancy for the nonconforming sand and gravel mining operation. The board members visited the site on the morning of the hearing. In preparation for the inspection, however, Van Sickle had moved the trash and covered it with dirt. At the hearing, he testified that he had removed a considerable amount of trash from the site and that he planned to mine gravel for two more years and fill the resulting hole for another three years. Two other individuals supported continuing the nonconforming use. While two residents sent letters of opposition to this plan to the Board of Adjustment,

none attended the hearing. At the conclusion of the hearing, the board decided to take no action to revoke the certificate and to call another hearing in nine months. There is no evidence in the record that the board ever again considered the matter.

While Van Sickle owned the site, two City demolition contractors dumped trash on the site. Illegal dumping continued from 1985 to 1993, and during this time the City invested little effort into deterring illegal dumping.[1] Over these eight years, the City issued fifteen citations for illegal dumping, six of which were for dumping at the Deepwood site. A 1985 memo to the mayor and City Council stated that the citations for illegal dumping at the site had been only a partial deterrent and noted that control of illegal dumping had been "loose."

In 1987, the City sued Van Sickle, V.V. Construction, and another defendant, Samson Horrice, for operating an illegal solid waste facility. As if to make matters plain, in 1988 the site caught fire and burned for over seven months. Finally, in December of 1989, the City obtained a judgment against the defendants ordering them to cease dumping at the site and to submit and implement a plan to close the site. But nothing changed.

The Bureau of Solid Waste Management of the Texas Department of Health inspected the site in April of 1991. The inspectors reported continued unauthorized dumping and no efforts to clean up the site as required by the 1989 judgment. According to the reports, the City was informed of the failure to clean up the site.

In November of 1991, the City moved for contempt against Van Sickle and Horrice for failure to comply with the judgment. No hearing was held because the City failed to serve one of the defendants. It appears that no further action was taken to enforce the judgment and ensure closure of the site. With this inaction, a decade of erratic enforcement staggered to a halt.

First State Bank had a lien on the site. In 1991, the Department of Housing and Neighborhood Services informed the bank that the site had been inspected and was in compliance with the City code. In 1992, First State Bank acquired the site when Van Sickle defaulted on a loan, and two years later it sold the site to Herman Nethery.

On August 1, 1994, Nethery, the new owner, applied for a construction permit from the City on behalf of Herman Nethery Recycling. Nethery described the proposed project as "fill & mine property." A section of the application set aside for "office use only" contains a notation that the application was not ready because it needed an accompanying affidavit stating that the proposed use had been in continuous operation since the original certificate of occupancy was issued. An affidavit was submitted to the City on August 2, 1994, stating, "VV Construction Company is in fact in business and continuing business on said property since 1982 to present time." The affiant was V.V. Construction Co. by Herman Nethery Recycling. The same day, the City issued a permit to Nethery for mining at the site. The accompanying contractor's authorization form notes that the City had to inspect

the property before Nethery could receive a certificate of occupancy.

Meanwhile, the City created an Illegal Dumping Team of six code enforcement inspectors to prevent illegal dumping at Deepwood and other sites. The inspectors issued numerous citations to people operating the site beginning on August 22, 1994. Despite the reports and citations, the City issued a certificate of occupancy to Nethery on December 5, 1994, apparently without first conducting the required inspection. The certificate allowed the operator of the site to "dump rock, gravel, sand, clean dirt free of vegetation and concrete, generated from Demolition efforts associated with the Urban Rehabilitation Standards Board Demolition Program." The City continued to issue citations for illegal dumping through November of 1996.

During the time that Nethery owned it, the site was operated by Herman Lee Gibbons. Gibbons was also a subcontractor on certain City contracts for demolition and hauling debris, and he dumped waste at the site. Other subcontractors on City demolition projects did the same. Gibbons and other site operators used copies of the certificate of occupancy issued by the City to prove to their customers that the site was a legal landfill.

Kenn Hornbeck, the City employee who supervised City demolition contracts, did not seek to terminate those subcontracts assertedly because he had been provided no proof that material from City demolition projects was being dumped illegally. Yet Hornbeck knew that Gibbons was operating an illegal dump at the site, and he continued to forward contracts with

Gibbons to the City Council for approval without informing them of Gibbons' connection with the dump. His department's attempts to monitor whether City demolition debris was disposed of properly were limited to checking receipts submitted for landfill disposal.

In April of 1995, the City sued Nethery for operating an illegal solid waste facility. Despite a resulting temporary injunction ordering Nethery to cease all operations at the site, illegal dumping continued through the end of 1996. Nethery was twice held in contempt of court and, as a result, spent 49 days in jail and was ordered to pay $ 2,500 in fines.

On June 22, 1995, in a further attempt to eliminate the continued illegal dumping, Environmental and Health Services code inspectors, Dallas police officers, and Department of Public Safety officers arrested 29 people and issued 152 code violation citations. The depth of resistance to City regulation is evident in the fact that the regulators requested police assistance because the operators of the facility were armed.

The site again caught fire and burned from February 1997 through April 1997. In April, the City Council was briefed on the site. At the briefing, several council members made statements indicating surprise and dismay that the Deepwood site had not been corrected. On member noted that "had it been in another area of the City, it would not have occurred."

On November 14, 1997, Nethery was permanently enjoined from operating a dump at the site. In addition, both Nethery and Gibbons were charged and convicted of organized criminal activity in connection with their

operation of the site. Both men were sentenced to prison, although Nethery's conviction was reversed on appeal.

II

On February 5, 1998, homeowners filed a civil action in federal district court against the City and others seeking injunctive relief under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, injunctive relief and damages under 42 U.S.C. §§ 1981 and 1983, and damages under the FHA and its accompanying regulations. Plaintiffs filed a similar case on July 28, 1998 regarding a nearby dump.[2] After consolidating the two cases, the district court bifurcated the case for separate trials of the class claim for injunctive relief under § 6901 and the non-class claims for damages under the FHA and its regulations and §§ 1981 and 1983.[3] After a bench trial, the district judge granted plaintiffs' request for injunctive relief on August 27, 1999, a judgment affirmed by this court.[4]

As for damages, plaintiffs claimed violation of Equal Protection rights under 42 U.S.C. §§ 1981 and 1983, violation of the Fair Housing Act (FHA), 42 U.S.C. §§ 1364(a),(b), and violation of federal housing regulations, 24 C.F.R. §§ 100.70(b),(d)(4). The district court granted summary judgment to the City on the FHA and federal housing regulations claims.[5] After a bench trial, the court entered final judgment for the City on the remaining claims under §§ 1981 and 1983.[6] Plaintiffs appeal the rejection of their claims under the FHA and §§ 1981 and 1983, but not the rejection of their claims under the federal regulations.

III

We review *de novo* the district court's grant of summary judgment to the City on the FHA claim.[7]

A

Plaintiffs allege that the City violated § 3604(a) of the FHA when it failed to prevent dumping at the site. Section 3604(a) makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[8]

The issue here is whether the failures and omissions by the City violate the FHA by "otherwise making unavailable or denying" a dwelling to any person because of race.[9] In an analogous context, we have stated that "although the 'otherwise make available or deny' phrase seems all-encompassing, its scope is not limitless."[10] Plaintiffs attack the district court's conclusion that, "to effect [sic] the availability of housing within the meaning of the FHA, the discriminatory actions must have a direct impact on Plaintiffs' ability, as potential home buyers or renters...to secure housing" and that "section 3604(a) protects the right of individuals to live where they choose, but it does not protect intangible interests in already-owned property such as habitability or value."[11]

Plaintiffs argue that the City violated § 3604(a) because the dump makes it more difficult for them to sell their houses and lowers the value of their houses. This claim

enjoys factual support, but it is not a claim of "unavailability" or "denial" of housing under a proper reading of the FHA. The failure of the City to police the Deepwood landfill may have harmed the housing market, decreased home values, or adversely impacted homeowners' "intangible interests, " but such results do not make dwellings "unavailable" within the meaning of the Act.

Sister circuits deciding cases turning on the reading of "unavailable" are in accord. The Seventh Circuit, in *Southend Neighborhood Improvement Association v. County of St. Claire*, in addressing claims that the county failed to clean up and maintain adjacent properties, held that "plaintiffs' claim that the county's discriminatory refusal to properly manage the properties it owns damaged their interests in neighboring properties" is "quite different from most of the practices that courts have deemed illegal under § 3604(a)."[12] It then held that § 3604(a)

> is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons, but it does not protect the intangible interests in the already-owned property raised by the plaintiffs' allegations.
>
> ...
>
> Courts have applied this subsection to actions having a direct impact on the ability of potential homebuyers or renters to locate in a particular area, and to indirectly related actions arising from efforts to secure housing. On the other hand, the plaintiffs here do not allege that they

> have been hindered in an effort to acquire a dwelling, but rather that the County's conduct toward certain properties damaged their own property.[13]

In *Halprin v. Prarie Single Family Homes of Dearborn Park Association*, the Seventh Circuit discussed §§ 3604(a) and (b):

> [the] plaintiffs, however, are complaining not about being prevented from acquiring property but about being harassed by other property owners. So it is difficult to see how they can have been interfered with in the enjoyment of any right conferred on them by section 3604.
>
> ...
>
> Title VII protects the job holder as well as the job applicant, so an employer who resorts to harassment to force an employee to quit is engaged in job discrimination within the meaning of the Act. The Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but *access* to housing. . . . Since the focus [of Congress] was on [minority's] exclusion, the problem of how they were treated when they were included, that is, when they were allowed to own or rent homes in such areas, was not at the forefront of congressional thinking. That problem - the problem not of exclusion but of expulsion - would become acute only when the law forced unwanted associations that might provoke efforts at harassment, and so it would tend not to

> arise until the Act was enacted and enforced. There is nothing to suggest that Congress was trying to solve that future problem, an endeavor that would have required careful drafting in order to make sure that quarrels between neighbors did not become a routine basis for federal litigation.[14]

The Fourth Circuit, in *Jersey Heights Neighborhood Association v. Glendening*, similarly held that there was no claim under § 3604(a) for the government's decision to locate a highway near a neighborhood because the claim of the plaintiffs, as current residents, "is too remotely related to the housing interests that are protected by the Fair Housing Act."[15] The Third Circuit came to the same conclusion in *Tenafly Erv Association v. Borough of Tenafly*, where it held that the Orthodox Jewish plaintiffs, who challenged the City's removal of religious objects from utility poles, had not stated a § 3604(a) claim because they were current homeowners and the removal only made their residency less desirable, not "unavailable."[16] Along the same lines, the D.C. Circuit has held that "by their plain terms [§ 3604(a),(f)(1)] reach only discrimination that adversely affects the availability of housing" rather than the "habitability."[17]

These cases buttress our conclusion that the simple language of § 3604(a) does not apply to current homeowners whose complaint is that the value or "habitability" of their houses has decreased because such a complaint is not about "availability." The discriminatory practice alleged here against current homeowners is quite unlike the discriminatory practices in other cases - for example, "racial steering,"

locking out owners of one race but not another, mortgage redlining, insurance redlining, exclusionary zoning - where the availability of housing for prospective owners or tenants is implicated.[18]

This is not to say that a current owner has no claim for attempted and unsuccessful discrimination relating to the initial sale or rental of the house, an issue we do not decide.[19] And it is not to say that a current owner or renter evicted or constructively evicted from his house does not have a claim.[20] We hold only that § 3604(a) gives no right of action to current owners claiming that the value or "habitability"[21] of their property has decreased due to discrimination in the delivery of protective city services.

Plaintiffs argue that we found, in *Hanson v. Veterans Administration*,[22] that actions falling short of complete denial of either the right to buy *or sell* may yet be covered by § 3604(a). Plaintiffs point to language in *Hanson* said to suggest as much,[23] but it will not bear that load. In *Hanson*, buyers and sellers alleged that the Veterans Administration discriminated against them by under-appraising houses because they were located in a black neighborhood, appraisals determining the size of the housing loans that the VA would guarantee. We first concluded that at least one plaintiff - a man who had been precluded from purchasing a particular house by virtue of the under-appraising - had standing to sue under § 3604(a). Consistent with our holding that § 3604(a) is not available for current owners who claim merely a decrease in value or habitability, we assessed only the standing of a specific *buyer* who had been *precluded* from acquiring his chosen home. Even if one focuses on the fact that the

court in *Hanson* allowed current homeowners to sue, the heart of the case was about unavailability for buyers - specific sales and purchases were being blocked.

This reading of the case aligns it with the cases it cited. In *Hanson*, we explained that, in *United States v. Mitchell*,

> the district court found that the defendant, which owned an apartment complex, steered black tenants to a particular section of the complex and that this effectively denied the black tenants access to equal housing opportunities. We affirmed the conclusion of the district court that these acts by the defendant made unavailable or denied "a dwelling to any person because of race." We held that "steering evidences an intent to influence the choice of the renter on an impermissible racial basis. The government need only establish that race was a consideration and played some role in the real estate transaction. [24]

Hanson also cited *Moore v. Townsend*,[25] where the Seventh Circuit dealt with defendants who had refused to negotiate with plaintiffs because plaintiffs were black and had thereby prevented the plaintiffs from acquiring the home. The court affirmed the district court's award of specific performance to the plaintiffs, noting that "race is an impermissible consideration in a real estate transaction, and it need only be established that race played some part in the *refusal to deal*."[26] This is consistent with our reading of § 3604(a) because the refusal to deal involved the acquisition, not value or "habitability," of housing.

Plaintiffs also argue that the dump has made housing "unavailable" because the land underneath the dump is now unavailable for housing for them or prospective residents. The court in *Jersey Heights*, in rejecting the same argument, held that the government, at most, made "unavailable" a portion of land that *could* at some future time become host to homes, a possibility insufficient to sustain an FHA claim.27 We agree. Although it is true that the statutory definition of "dwelling" includes "vacant land which is offered for sale or lease for the construction or location thereon" of residential buildings,[28] there is no indication that the Deepwood site, other than being partially zoned residential, was offered for sale for the construction of residential buildings; furthermore, there is no guarantee that housing would have been constructed on the land, even had the City stringently enforced its dumping laws. In addition, there is no indication that other land is not available for housing. And, even if there were no other land available for housing, it is not clear that such a fact would be sufficient for a § 3604(a) claim,[29] an issue we need not decide. The "unavailability" of the land underneath the dump does not support the FHA claim.[30]

Because housing was not made "unavailable" to plaintiffs, the district court's rejection of their § 3604(a) claim was proper.

B

Plaintiffs also allege that the City violated § 3604(b) of the FHA when it failed to prevent dumping at the site. Section 3604(b) makes it unlawful "to discriminate against any person in the terms, conditions, or

privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[31] They contend that the City discriminated against them in the provision of a service[32] - the enforcement of zoning laws - and they attack the district court's conclusion that § 3604(b) "applies only to discrimination in the provision of services that precludes the sale or rental of housing."[33] Even assuming that the enforcement of zoning laws alleged here is a "service,"[34] we hold that § 3604(b) is inapplicable here because the service was not "connected" to the sale or rental of a dwelling as the statute requires.

The district court observed that "it is necessary to decide whether the language 'in connection with' refers to the 'sale or rental of a dwelling' or merely the 'dwelling' in general."[35] And as the district court correctly concluded, it is the former. This reading is grammatically superior and supported by the decisions of many courts.[36] There is more.

Although the FHA is meant to have a broad reach, unmooring the "services" language from the "sale or rental" language pushes the FHA into a general anti-discrimination pose, creating rights for any discriminatory act which impacts property values - say, for generally inadequate police protection in a certain area. And, unlike general discrimination prohibitions enforced by § 1983, the FHA targets private activity, does not require a governmental policy or custom, and does not require proof of both discriminatory impact and intent. While sweeping widely, the FHA does so in the housing field and remains a housing statute - the

focus of congressional concern. That the corrosive bite of racial discrimination may soak into all facets of black lives cannot be gainsaid, but this statute targets only housing. And the "services" subject to the alleged discrimination must be "in connection" with the "sale or rental of a dwelling . . . ."[37]

The claims here do not assert the requisite connection between the alleged discrimination and the sale or rental of a dwelling - that is, § 3604(b) does not aid plaintiffs, whose complaint is that the value or "habitability" of their houses has decreased.

This is not to say that § 3604(b) applies only if the plaintiff was precluded from finding housing. For example, § 3604(b) may encompass the claim of a current owner or renter for attempted and unsuccessful discrimination relating to the initial sale or rental or for actual or constructive eviction. Indeed, in *Woods Drake v. Lundy*, this court held that the latter situation could sustain a § 3604(b) claim.[38] In *Woods Drake*, a landlord refused to continue renting to a tenant because the tenant entertained black guests. The tenant vacated and sued the landlord under § 3604(b) for imposing a "whites-only" condition on the terms of his lease, and the court held that he had a claim.[39] This was akin to constructive conviction and was a clear discriminatory condition of "sale or rental of the dwelling."

We are persuaded that the alleged service here was not "connected" to the sale or rental of a dwelling, as the statute requires. Thus, the district court properly rejected the § 3604(b) claim.

III

Plaintiffs also appeal the district court's judgment, after a bench trial, in favor of the City on the § 1981 and § 1983 claims. The district court concluded that there was no proof of official action and, in the alternative, that there was no proof of discriminatory intent.

The district court's findings of fact are subject to clearly erroneous review.[40] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[41] We construe the evidence in the light most favorable to upholding the district court's finding.[42] Rule 52(a) does not require the district court to "recite every piece of evidence supporting its findings" or to "sort through the testimony of each of [the] witnesses."[43] The rule "exacts neither punctilious detail nor slavish tracing of the claims issue by issue and witness by witness. . . . It simply requires findings that are explicit and detailed enough to enable us to review them under the applicable standard."[44]

In much of their brief, plaintiffs assert their own version of the facts. To that extent, their efforts are in vain.[45] They also argue that the district court failed to consider key evidence: evidence of disparate treatment between black and white communities. That evidence allegedly shows that the City mishandled illegal dumping in black neighborhoods while more diligently handling illegal dumping in white neighborhoods, and that there were other illegal landfills in black neighborhoods, but not in similar white neighborhoods, that accepted City demolition debris. We have required that the district court explain or at least acknowledge such evidence in, for example, Voting Rights Act

cases.[46] The City argues that this heightened recitation requirement is confined to such cases. Plaintiffs point to other types of cases insisting that the district court address contrary evidence.[47] We need not decide this question because we conclude that, even if such a requirement exists, the district court complied with it by properly explaining its conclusion that there was no official policy and implicitly discounting the contrary evidence.

Municipal liability under both[48] § 1981 and § 1983 requires proof of three elements in addition to the underlying claim of a violation of rights: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom."[49] The district court found that the City Council and the Board of Adjustment are policymakers and that the City Manager and the City Attorney are not policymakers.[50]

An "official policy" is either a policy statement, ordinance, regulation, etc., that has been officially adopted by a policymaker, or a persistent, widespread practice of officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents the municipality's policy.[51] Plaintiffs allege the latter. "An act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law."[52] The policymaker must have either actual or constructive knowledge of the alleged policy.[53] Plaintiffs allege that there were two customs: 1) permitting disposal of City demolition debris in predominantly

black neighborhoods; and 2) failing to protect black neighborhoods from illegal dumping.

Regarding disposal of debris from City projects, the district court acknowledged that "the evidence supports the inference that City demolition debris was dumped at the Deepwood site" and that various City employees "could have, through the exercise of proper diligence, known about and stopped the dumping of City demolition debris."[54] However, the district court found that *even if* there existed such a policy, the policymakers had no actual or constructive knowledge of it. The court was swayed by statements made at a 1997 City Council meeting, finding that they "belie any prior knowledge of illegal dumping of City demolition debris at Deepwood."[55] The court concluded that "there is no evidence that either policymaker [the City Council or the Board of Adjustment] had actual or constructive knowledge of this practice [dumping City debris] at the time it occurred."[56]

This finding is not clearly erroneous. The "missing" evidence of disparate treatment of white and black neighborhoods would not impact the finding that the policymakers here had no actual or constructive knowledge that City debris was being dumped illegally at Deepwood.

As for failing to protect black neighborhoods from dumping, the district court rehashed attempts by the City to bring Deepwood back in line, including evidence of citations issued for illegal dumping, suits against Deepwood's owner and operator, a judgment requiring cessation of illegal dumping and cleanup, and the creation of an Illegal Dumping Team.[57] While the

district court observed that "the City's efforts to stop the illegal dumping at Deepwood were inconsistent, inadequate, and largely ineffective for years,"[58] it concluded that the City's actions amounted to "negligence,"[59] not a custom. That conclusion is sound in law and fact.

Plaintiffs assert that the district court should be reversed for its failure to reference the evidence of disparate treatment between black and white neighborhoods - that is, the evidence of other black neighborhoods suffering the same plight and of white neighborhoods that were better-treated. Such a requirement of "punctilious detail"[60] goes nowhere in this case. The district court's recitation of a litany of evidence, and its conclusion that the City acted negligently, came with full awareness of this "missing evidence." Indeed, the court cited it in its denial of the defendants' motion for summary judgment, implicitly discounting its value at trial.

IV

The judgments of the district court in favor of the City are AFFIRMED.

Footnotes

n1 The district court noted that a coordinated effort by the Street and Sanitation Service Department, the State Health Department, the Department of Housing and Neighborhood Services, and the Public Works Department was begun in 1985 to clean up the site. This was apparently ineffective.

n2 It appears that the plaintiffs did not seek damages for this second dump, the "South Loop 12 Dump," after the injunction was issued for both dumps.

n3 It appears that the bifurcation order ignored the claims for injunctive relief under §§ 1981 and 1983, but they became moot after the court granted the injunction under § 6901.

n4 *Cox v. City of Dallas*, 256 F.3d 281, 285 (5th Cir. 2001).

n5 *Cox v. City of Dallas*, 2004 U.S. Dist. LEXIS 2729, Civ. 3:98-CV-1763-BH, 2004 WL 370242, at *5-*9 (N.D. Tex. Feb. 24, 2004) (unpublished).

n6 *Cox v. City of Dallas*, 2004 U.S. Dist. LEXIS 18968, No. 3:98-CV-1763-BH, 2004 WL 2108253, at *16 (N.D. Tex. Sept. 22, 2004) (unpublished).

n7 *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005).

n8 42 U.S.C. § 3604(a).

n9 Plaintiffs do not contend that any of the other clauses of § 3604(a) apply.

n10 *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 531 (5th Cir. 1996) (construing an analogous clause of the FDA, § 3604(f)).

n11 *Cox*, 2004 U.S. Dist. LEXIS 2729 at *19, 2004 WL 370242, at *6 (internal citations and quotations omitted).

n12 743 F.2d 1207, 1210 (7th Cir. 1984).

n13 *Id.*

n14 388 F.3d 327, 329 (7th Cir. 2004) (emphasis in original).

n15 174 F.3d 180, 192 (4th Cir. 1999).

n16 309 F.3d 144, 157 n.13 (3d Cir. 2002).

n17 *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 289 U.S. App. D.C. 121, 929 F.2d 714, 719 (D.C. Cir. 1991).

n18 *Evans v. Tubbe*, 657 F.2d 661, 663 n.3 (5th Cir. 1981) (erecting gate across the only access road to properties and giving gate keys only to white owners made properties "unavailable" under § 3604(a)); *United States v. Mitchell*, 580 F.2d 789, 790-91 (5th Cir. 1978) (steering black to one section of large housing complex and indicating that no other vacancies were available violated § 3604(a)); *Southend Neighborhood*, 743 F.2d at 1209 (emphasis added), *citing Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982) (discriminatory rental decisions); *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981) (rejection of public and low-income housing and adoption of restrictive land use ordinances); *Marable v. H. Walker & Assocs.*, 644 F.2d 390 (5th Cir. 1981), *appeal after remand*, 704 F.2d 1219 (11th Cir. 1983) (unequal application of rental criteria by landlord); United *States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978) (racial steering); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (adoption of restrictive zoning law); *NAACP v. Am. Family Mut.*

Ins. Co., 978 F.2d 287, 297-98 (7th Cir. 1992). The non-controlling cases cited by amici do not contradict this: they either do not deal directly with § 3604(a), *see Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364-65 (8th Cir. 2003); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1088-90 (10th Cir. 1993); *Byrd v. Brandeburg*, 922 F. Supp. 60, 62-66 (N.D. Ohio 1996), do not address the "availability" issue head-on, *see United States v. L&H Land Corp., Inc.*, 407 F. Supp. 576, 579-80 (S.D. Fla. 1976); *Lane v. Cole*, 88 F. Supp. 2d 402, 405-06 (E.D. Pa. 2000), or deal with situations where current owners are suing because houses have been made unavailable to others, *see supra* note 11; *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110-11, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979); *United States v. Am. Inst. of Real Estate Appraisers of Nat. Ass'n of Realtors*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977). It is true that insurance redlining (although generally not mortgage redlining) may injure current owners in their capacity as current owners, in the unusual circumstance that they apply for insurance *after* purchasing a house, but the evil there is still *access* to homes for new owners/tenants - that is, the practice of insurance redlining serves to reduce access to houses to future owners, as it "indirectly relates [to] actions arising from efforts to secure housing." *See Southend Neighborhood*, 743 F.2d at 1210. Thus, it is properly within the ambit of § 3604(a). *See, e.g., NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297-98 (7th Cir. 1992).

n19 *See, e.g., Heights v. Cmty. Cong. v. Hilltop Realty, Inc.*, 629 F. Supp. 1232, 1249 (N.D. Ohio 1983); *Cmty. Hous. Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208 (D.D.C. 2003); *but see*

Halprin, 388 F.3d at 329 (denying § 3604(a) claim where plaintiffs "are complaining not about *being prevented from acquiring property* but about being harassed by other property owners" (emphasis added)).

n20 *See Jersey Height*, 174 F.3d at 192 (noting that plaintiffs had not alleged "that anyone has for discriminatory reasons *been evicted from his home* or denied the right to purchase or rent housing" (emphasis added)); *Clifton Terrace Assocs.*, 929 F.2d at 719-20 (noting that "the denial of certain essential services relating to a dwelling, such as mortgage financing, sewer hookups, zoning approval, or basic utilities, might result in the denial of housing" per § 3604(a)); *but see Halprin*, 388 F.3d at 329 (holding that attempted constructive eviction by orchestrated harassment campaign of neighbors and housing association was not covered by § 3604(a), and noting that plaintiffs "are complaining not about *being prevented from acquiring property* but about being harassed by other property owners" (emphasis added)).

n21 We realize that a § 3604(a) claim for "constructive eviction" would be a type of "habitability" claim - that the "habitability" has so decreased that continued residency is not objectively reasonable. We reject only those "habitability" claims that fall short of constructive eviction, leaving the question of constructive eviction for another day. *See supra* note 21 (citing *Clifton Terrace Assocs.*, 929 F.2d at 719-20 (describing the denial of certain "essential services" - a type of constructive eviction - as possibly resulting in a § 3604(a) claim)).

n22 800 F.2d 1381 (5th Cir. 1986).

n23 *Id.* at 1386 ("Courts have consistently given an expansive interpretation to the Fair Housing Act; to state a claim under the Act, it is enough to show that race was a consideration and played some role in a real estate transaction");

> We conclude that section 804(a) [§ 3604(a)] does address the claim asserted by appellants. Discriminatory appraisal may effectively prevent blacks from purchasing or selling a home for its fair market value. This interferes with the exercise of rights granted by the Fair Housing Act.

Id.

n24 *Hanson*, 800 F.2d at 1386 (quoting *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (citations omitted)).

n25 525 F.2d 482 (7th Cir. 1975).

n26 *Id.* at 485 (emphasis added). Although claims were brought under both § 3604(a) and § 1982, the court apparently addressed only the latter; nonetheless, the case is consistent with our holding.

n27 *Jersey Heights*, 174 F.3d at 192-93 (plaintiffs claimed that the highway "will serve as the northern boundary to their community, closing off expansion in that direction and locking African Americans into what is allegedly the only neighborhood open to them").

n28 42 U.S.C. § 3602(b).

n29 *See Jersey Heights*, 174 F.3d at 192-93 (holding that § 3604(a) was not violated even where there was allegedly no land for expansion)

n30 Finally, plaintiffs cite 24 C.F.R. § 100.70(a),(d), which interpret part of § 3604(a), for the proposition that the § 3604(a) "is violated by actions that impede, restrict[,] discourage, obstruct, or restrict persons' attempt to *sell* or buy housing or treat those persons' attempt to *sell* or buy housing differently because of race of color" (emphasis added). Again, however, plaintiffs have incorrectly shifted the focus (here, the focus of the regulations) from preventing restrictions on the buyers' choice to preventing restrictions on the buyers' and sellers' choice. Section 100.70(a) states that discrimination is unlawful "in connection with seeking, negotiating for, buying or renting a dwelling," not in connection with selling a dwelling. And § 100.70(c) states specifically that the acts prohibited under subsection (a) "are generally referred to as unlawful steering practices;" our case does not involve unlawful steering. Plaintiffs and amici also argue that § 100.70(d)(4), which states that refusing to provide municipal services or insurance based on race is unlawful, shows that plaintiffs have a § 3604(a) claim. However, the preface to § 100.70(d)(4) states that "prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to . . . ." Section 100.70(b) states that it is unlawful to discriminate by "engaging in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to person." This language, which parrots the "otherwise make unavailable or deny" language in § 3604(a), prohibits conduct only insofar as

the conduct "denies" housing or makes it "unavailable" - it does not (and cannot) expand the reach of the underlying statute. This conclusion is buttressed by the fact that the other prohibited activities listed in § 100.70(d)(1)-(3) relate to the sale or rental of a dwelling, not its continuous use, and the title of § 100.70 is "Other prohibited sale and rental conduct." And, as we have shown, the alleged actions here have not "denied" or made "unavailable" housing to plaintiffs.

n31 42 U.S.C. § 3604(b).

n32 The only other language in § 3604(b) that could possibly apply is that regarding the "privileges of sale." It is not clear if plaintiffs argue that they were denied such privileges (they never use the word "privileges" except in quoting the statute), and the district court analyzed only the "services" claim. Amici, however, argue the issue. Generously characterizing plaintiffs' argument to include this contention, we find it unavailing for the same reason that the "services" claim is unavailing: the privileges here are not connected to the "sale or rental of a dwelling." Amici argue that "privileges" must include the privileges of continued occupancy and quiet enjoyment, and they cite Halprin, 388 F.3d at 329, which they argue contains language supporting this position but rejects "inexplicably" the § 3604(b) claim. But amici never explain why "privileges" does not pertain only to the "sale or rental of a dwelling;" their argument, relying solely on the meaning of the word "privileges," is unconvincing. And their reliance on *Halprin* is misplaced. The court in that case conceded only that, "as a purely semantic matter the statutory language might be stretched far enough to reach a case of '*constructive eviction*' . . ." (emphasis

added). As we noted in Part A, *supra*, and as we note in Part B, *infra*, we do not foreclose the possibility of a § 3604(a) or (b) claim as the result of eviction or constructive eviction, because such actions may make housing "unavailable" or deny "privileges of sale" or "services."

n33 *Cox*, 2005 U.S. Dist. LEXIS 2729, 2004 WL 370242, at *8.

n34 There is some authority that it is such a service. *See Southend Neighborhood*, 743 F.2d at 1210 (holding that S$ 3604(b) "applies to services generally provided by governmental units such as police and fire protection or garbage protection"); *Jersey Heights*, 174 F.3d at 193 (holding that § 3604(b) applies to "garbage collection and other services of the kind usually provided by municipalities" (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (4th Cir. 1984)). However, there is also authority suggesting that it is not such a service. *See Clifton Terrace Assocs.*, 929 F.2d at 720 (suggesting that § 3604(b) may not apply to municipal services at all, and holding that § 3604(b) does not apply to the provision of elevator repair services); *Southend Neighborhood*, 743 F.2d at 1210 (holding that § 3604(b) does not apply to the decision where to location a highway); *Jersey Heights*, 174 F.3d at 193 (holding that § 3604(b) does not apply to a county's failure to clean up, maintain, and make safe property adjacent to a residential neighborhood). In any event, we do not decide the issue.

n35 *Cox*, 2004 U.S. Dist. LEXIS 2729 at *20, 2004 WL 370242, at *7 (quoting § 3604(b)).

n36 *See, e.g, Clifton Terrace Assocs.*, 929 F.2d at 720; *Halprin v. Prairie Single Family Homes*, 208 F. Supp. 2d 896, 901 (N.D. Ill. 2002); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 2002). To the extent that some courts hold that general police and fire protection are within the scope of § 3604(b), one *may* be able to read their holdings as to the contrary; however, one can still conceivably connect police and fire protection to the "sale or rental of a dwelling" (especially rental). *See Southend Neighborhood*, 743 F.2d at 1210 (holding that § 3604(b) "applies to services generally provided by governmental units such as police and fire protection or garbage protection"); *Jersey Heights*, 174 F.3d at 193 (holding that § 3604(b) applies to "garbage collection and other services of the kind usually provided by municipalities" (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (4th Cir. 1984)); *Lopez v. City of Dallas*, 2004 U.S. Dist. LEXIS 18220, No. 3:03-CV-2223-M, 2004 WL 2026804,, at *7 (N.D. Tex. Sept. 9, 2004) (unpublished).

n37 As with 24 C.F.R. § 100.70, *see supra* note 29, plaintiffs and amici argue that § 100.65(b), which implements § 3604(b), shows that no such connection is required. However, the preface to § 100.65(b) states that "prohibited actions under this section include, but are not limited to . . . ." The section referenced (section a)) states that it is unlawful to discriminate by "imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling or to deny or limit services of facilities in connection with the sale or rental of a dwelling." This language, which parrots the language in § 3604(b), prohibits conduct only insofar as the conduct "relates to" or is "in connection with" the sale or rental of a dwelling." And the alleged conduct

here does not "relate to" and is not "in connection with" any sale or rental. We recognize that, while some of the actions prohibited by the regulations - using different leases or contracts for sale and failing to process an offer or application - clearly are connected to the "sale or rental of a dwelling," others appear not to be - for instance, failing or delaying maintenance or repairs. But we decline to take such a cramped view of the latter type of actions - even they can be "connected to" the sale or rental of a dwelling, as when, for instance, such actions are aimed at evicting or constructively evicting a tenant. *See infra* note 38 and accompanying text.

n38 667 F.2d 1198 (5th Cir. 1982).

n39 667 F.2d at 1201-02.

n40 FED. R. CIV. P. 52(a) ("In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

n41 *Anderson*, 470 U.S. at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)) (internal quotation marks omitted).

n42 *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 965 (5th Cir. 1996).

n43 *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir. 1993).

n44 *Id.* (internal quotation marks and citations omitted) (brackets in original).

n45 *Schlesinger*, 2 F.3d at 139 (footnote omitted):

> In essence, the appellants list their own version of the facts and then complain that the district court violated Rule 52 by ignoring these "facts." The district court did not ignore facts. It simply found facts contrary to the appellants' liking.

n46 *See, e.g., Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989) (stating that voting rights cases are unique and require special attention to the record); *Houston v. Lafayette County*, Miss., 56 F.3d 606, 612 (5th Cir. 1995) (finding clear error in voting rights case and remanding for more extensive explanation of why certain statistics were rejected); *Teague v. Attala County*, 17 F.3d 796, 798 (5th Cir. 1994) ("This court is unable to discharge our appellate function in voting rights cases without more guidance by the trial court concerning its credibility choices on the welter of evidence before it.")

n47 *See, e.g., Lopez v. Current Director*, 807 F.2d 430, 434 (5th Cir. 1987) (noting in discriminatory discharge and treatment case that "only if the district court specifies which evidence it adopted and which evidence it rejected in making its finding can we properly and

effectively apply the clearly erroneous standard"); *Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394, 401 (5th Cir. 1986) (noting in a national origin employment discrimination case that district court "must at least refer to the evidence tending to prove and disprove the merits of the proffered explanation and state why the court reached the conclusion that the explanation has not been discredited. We have, therefore, routinely reversed a trial court that has failed to set forth sufficient findings of fact and conclusions of law in actions under Title VII."); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 196-97 (5th Cir. 1991) (remanding quid pro quo claim for further consideration because that claim "was not separately focused upon" by district court).

n48 *Evans v. City of Houston*, 246 F.3d 344, 358 (5th Cir. 2001) (extending the *Monnell* official action requirement to § 1981 claims).

n49 *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)).

n50 *Cox*, 2004 U.S. Dist. LEXIS 18968, 2004 WL 2108253, at *7-*9. The parties agree that the City Council is a policymaker, but the City argues that the Board of Adjustment is not. We assume, but do not decide, that the Board of Adjustment is a policymaker.

n51 *See Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 289 (5th Cir. 2002).

n52 *Board of County Comm'rs of Bryan County v.*

Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

n53 *See Piotrowski*, 237 F.3d at 579. ("Actual or constructive knowledge of a custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority."); *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984).

n54 *Cox*, 2004 U.S. Dist. LEXIS 18968 at *30, 2004 WL 2108253, at *10.

n55 *Id.*

n56 *Id.*

n57 *Cox*, 2004 U.S. Dist. LEXIS 18968, 2004 WL 2108253, at *10-*12.

n58 2004 U.S. Dist. LEXIS 18968 at *34, [WL] at *11.

n59 In discussing the general basis for its rejection of the § 1983 claim as part of its summary rejection of the § 1981 claim, the court stated: "Plaintiffs failed to establish by a preponderance of the evidence that the City's actions were more than negligence and were the result of an intent to discriminate against them on the basis of race, rather than gross negligence."). 2004 U.S. Dist. LEXIS 18968 at *47, [WL] at *16.

n60 *Schlesinger*, 2 F.3d at 139.

Civil Action No. 3:98-CV-1763-BH

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HAROLD COX, et al,
Plaintiffs,

v.

THE CITY OF DALLAS,
Defendant.

September 21, 2004, Decided
September 22, 2004, Filed

COUNSEL: For Harold Cox, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX. Michael M Daniel, Law Office of Michael M Daniel, Dallas, TX.

For Shirley Davidson, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX.

For Robert Stubblefield, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX.

For Cynthia Herring, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX.

For Eloise Edwards, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX.

For Betty Curley, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX.

For Leo Easter, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX.

For Dallas TX City of, Defendant: Albert M Bronson, Attorney General of Texas, Environmental Protection Division, Austin, TX. Janice Smith Moss, Dallas City Attorney's Office, Dallas, TX. Thomas P Perkins, Jr, Dallas City Attorney's Office, Dallas, TX. Caroline Jordan, Dallas City Attorney's Office -- City Hall, Dallas, TX. John L Anderson, Dallas City Attorney's Office, Dallas, TX.

For Dan Pearson, in his capacity as Executive Director of the Texas Natural Resources Conservation Commision, Defendant: Albert M Bronson, Attorney General of Texas, Environmental Protection Division, Austin, TX.

Terry Van Sickle, Defendant.

Herman Nethery, Defendant.

JUDGES: IRMA CARRILLO RAMIREZ, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: IRMA CARRILLO RAMIREZ

OPINION:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs sued the City of Dallas ("City"), alleging violations of *42 U.S.C. § 1983* and *42 U.S.C. § 1981*. On March 1-3, 2004, the Court conducted a bench trial of this case. After consideration of the testimony and evidence presented during the trial, the parties' pre-trial and post-trial proposed findings of fact and conclusions of law, the post-trial briefing, the arguments of counsel, and the relevant authorities, the Court finds and concludes as set forth below.

I. BACKGROUND

On February 5, 1998, Plaintiffs filed civil action number 3:98-CV-0291 against the City and others, alleging illegal dumping and race discrimination. On July 28,1998, Plaintiffs filed a second suit, civil action number 3:98-CV-1763, against the City and others for alleged illegal dumping and race discrimination. The district court entered an order consolidating the two cases under 3:98-CV-0291 on August 17, 1998. On December 17, 1998, the district court bifurcated the claims in the consolidated cases. The district court's order specified that civil action 3:98-CV-0291 would be a class action suit for injunctive relief brought under *42 U.S.C. § 6901* for illegal dumping and would be tried first. The order further specified that after resolution of the illegal dumping claims, Plaintiffs' claims of race discrimination would be tried in civil action 3:98-CV-1763, which was not a class action suit. After a bench trial in 3:98-CV-0291, the district court entered a final judgment granting Plaintiffs' request for injunctive relief on August 27, 1999. On September 7, 1999, civil action 3:98-CV-0291 was closed, and civil action 3:98-CV-1 763 was reopened. Civil action 3:98-CV-1763 was transferred to this Court on March 11, 2003, for the

conduct of all further proceedings in Plaintiffs' suit against the City for race discrimination.

In *Plaintiffs' Revised Fourth Amended Complaint*, filed October 2, 2003, Plaintiffs alleged violations of the *Fourteenth Amendment to the U.S. Constitution*, *42 U.S.C. § 1981*, *42 U.S.C. § 1983*, the Fair Housing Act, *42 U.S.C. § 3601 et seq.*, and 24 C.F.R. § 100.70(b), (d)(4). In particular, Plaintiffs asserted that the City failed to stop the illegal dumping at the Deepwood site with the intent to discriminate against Plaintiffs because of their race. (Compl. at 13.) On February 24, 2004, this Court awarded summary judgment to the City on Plaintiffs' claims brought under the Fair Housing Act, *42 U.S.C. § 3604(a)* and *(b)*, and *42 U.S.C. § 1983* for violations of 24 C.F.R. § 100.70(b), (d)(4). A bench trial on Plaintiffs' remaining claims of violations of *42 U.S.C. § 1981* and *42 U.S.C. § 1983* was held on March 1-3, 2004.

II. FINDINGS OF FACT[1]

1. Plaintiffs are African-American homeowners living in a residential neighborhood adjacent to a landfill located at 523 Deepwood Street, Dallas, Texas ("Deepwood site"). (Am. JPO at 4.)

2. The City is a municipal government organized and operating under the laws of the state of Texas. (Am. JPO at 4.)

3. The Deepwood neighborhood was annexed by the City on August 6, 1956, and was zoned R-7.5 (Residential). (Am. JPO at 8.)

4. On March 20, 1963, the City granted permission to locate an office building at the Deepwood site for a nonconforming sand and gravel mining operation. (Am. JPO at 8.)

5. A certificate of occupancy was issued on August 16, 1963, for a gravel pit at the Deepwood site on the basis that the use was nonconforming. (Am. JPO at 8.)

6. At that time, the ethnic background of the residents of the Deepwood neighborhood was predominately white, non-Hispanic. (Am. JPQ at 8.)

7. A portion of the Deepwood site was zoned Industrial-2, and Specific Use Permit ("SUP") 182 was issued for a mining operation adjacent to the residential neighborhood, on March 30, 1965. (Am. JPO at 5, 8.) To date, SUP 182 has not been revoked. (Am. JPO at 7.)

8. Between the 1970 and 1980 U.S. Census, the ethnic background of the residents of the Deepwood neighborhood changed from predominately white, non-Hispanic to predominately African-American. (Am. JPO at 8.)

9. Plaintiffs purchased homes in the Deepwood neighborhood between 1970 and 1978. (Am. JPO at 8.)

10. As early as 1976, there was open dumping of solid waste at the Deepwood site. *See Cox v. City of Dallas, 256 F.3d 281, 285 (5th Cir. 2001).* At that time, officials from the City and the state visited the site and called for continuing surveillance. *Id.*

11. From 1982 through 1992, the Deepwood site was owned by Terry Van Sickle, owner of V.V. Construction Co. (Am. JPO at 5-6.)

12. On March 16, 1982, V.V. Construction Co. submitted a permit application for removal of sand and gravel from the Deepwood site. (Am. JPO at 5.) The application stated that the old pits were to be filled with solid waste, meaning "all putrescible and non putrescible discarded materials or unwanted rock, dirt, metal, sand gravel wood etc." (Am. JPO at 5.)

13. On April 6, 1982, V.V. Construction Co. was issued a certificate of occupancy for mining sand and gravel at the Deepwood site based on the March 16, 1982 application. (Am. JPO at 5.)

14. In a letter dated April 16, 1982, the City granted Van Sickle permission to fill the mined area at the Deepwood site. (Am. JPO at 5.)

15. On November 22, 1982, one of the plaintiffs in this action filed a complaint with the City, alleging massive illegal dumping at the Deepwood site. (P.'s Exh. 46.)

16. The City's response to the complaint indicates that a citation to municipal court had been issued to the owner of the property on November 11, 1982, for conducting a sanitary landfill operation in R-7.5 zoning. (P.'s Exh. 47.) Weekly reinspections revealed no additional illegal dumping as of December 9, 1982. (P.'s Exh. 47.)

17. In the first four months of 1983, residents of the Deepwood neighborhood appeared five times at City

Council meetings to express concern about the Deepwood site. (P.'s Exh. 48-52.)

18. In response to residents' concerns raised at City Council meetings about truck traffic, noise, air pollution, and illegal dumping, the Assistant City Manager issued a memorandum to the Mayor and City Council dated February 4, 1983. (D.'s Exh. 92.) The memorandum indicated that the owner of the Deepwood site was fined for operating a sanitary landfill on the site, and that illegal dumping at the site had ceased. *Id.* The author stated his belief that once truck traffic to the site was diverted away from residential streets, most of the citizens' concerns would be resolved. *Id.*

19. At the instruction of the City Council, tests were conducted at the Deepwood site on February 22, 1983, to determine the quality of the fill materials. (D.'s Exh. 111.) The study found that the site was "being filled with soil and rock with approximately 20 percent other materials such as brush, trees, and demolition rubble being allowed." *Id.* The soil was not found to be contaminated. *Id.*

20. A May 18, 1983 memorandum from a City employee to a City Councilperson reported that no contaminants were found in the soil or water table at the Deepwood site and that continued monitoring of the site was to take place every four to six months for five years. (D.'s Exh. 51.)

21. On April 27, 1983, the City Council passed a resolution requesting that the Board of Adjustment initiate a public hearing to consider terminating the

nonconforming use of the Deepwood site. The resolution referenced the operation of a "stone, sand, or gravel mining use" on the property but did not mention the fact that the site had been used as an illegal dump. (P.'s Exh. 97.)

22. Notice of the hearing was issued by the Board of Adjustment and the hearing was held on July 26, 1983. (P.'s Exh. 99, 101.)

23. The morning of the hearing, the members of the Board of Adjustment inspected the Deepwood site. (P.'s Exh. 103 at 8.)

24. The Board of Adjustment believed the basis for considering terminating the nonconforming use at the Deepwood site was the noise, dust, and traffic associated with the mining operation. (P.'s Exh. 103 at 1.) Two letters from residents in favor of terminating the nonconforming use at the site were sent to the Board of Adjustment. (P.'s Exh. 100.) At the hearing, Mr. Van Sickle testified that he had removed a considerable amount of debris from the site, and that he planned to mine gravel for two more years and fill the hole for another three years. (P.'s Exh. 103 at 5.) Two other individuals testified in favor of continuing the nonconforming use. (P.'s Exh. 101.) At the conclusion of the hearing, the Board of Adjustment voted to take no action terminating the nonconforming use and to call another hearing in nine months. (P.'s Exh. 101.)

25. The issue of terminating the nonconforming use at the Deepwood site was never again considered by the Board of Adjustment.

26. The City Council did not request further action by the Board of Adjustment on the issue of the nonconforming use at the Deepwood site.

27. In a letter dated October 16, 1985, the Texas Department of Health complained to the City about solid waste permits being issued by the Dallas Urban Housing Authority in violation of the *Texas Solid Waste Disposal Act*. (P.'s Exh. 126.) The letter noted that if permits were issued for materials excluded by the Act, the City was responsible for ensuring that no prohibited materials were deposited. *Id.*

28. A November 7, 1985 memorandum to the Mayor and City Council stated that the issuance of citations for illegal dumping in the area surrounding the Deepwood site had proven only a partial deterrent to the problem of illegal dumping. (P.'s Exh. 127.) The memorandum noted that control of illegal dumping at the Deepwood site had been "loose." A coordinated effort by the Street and Sanitation Service Department, the State Health Department, the Department of Housing and Neighborhood Services, and the Public Works Department was begun to clean up the illegal dumps. *Id.*

29. From 1985 through 1993, the City invested minimal effort into deterring illegal dumping. Of the three citations issued by the City for illegal dumping in 1985, one was for dumping at the Deepwood site. (P.'s Exh. 128.) Two citations for illegal dumping were issued in 1986, both for dumping at the Deepwood site. *Id.* Five citations for illegal dumping were issued in 1987, three of which were for dumping at the Deepwood site. *Id.* Two citations were issued in 1988, neither of which was

for illegal dumping at the Deepwood site. *Id.* No citations were issued in 1989 or 1990. *Id.* Two citations for illegal dumping were issued in 1991, neither, for Deepwood. *Id.* No citations for illegal dumping were issued in 1992, and only one citation was issued in 1993. *Id.*

30. Illegal dumping continued at the Deepwood site, and in 1987, the City sued Van Sickle, V & V Construction Co., and Samson Horrice for operating an illegal solid waste facility or municipal solid waste site. (Am. JPO at 5.)

31. In 1988, the Deepwood site caught fire and burned for over seven months. *Cox v. City of Dallas, 1999 U.S. Dist. LEXIS 22748, 1999 WL 33756552, *4 (N.D. Tex. 1999).*

32. On December 29, 1989, the City obtained a judgment against Van Sickle and Horrice for operating an illegal municipal solid waste disposal site. (Am. JPO at 6.) The judgment ordered cessation of disposal of municipal solid waste at the Deepwood site and submission and implementation of a plan to close the site. *Id.*

33. Resident complaints about illegal dumping at the Deepwood site were received in 1990, 1991,1993, and 1994, by the agency charged with code enforcement. (P.'s Exh. 54, 55, 56, 57.)

34. On November 21, 1991, the City moved for contempt against Van Sickle and Horrice for failure to comply with the terms of the judgment. (P.'s Exh. 136.)

35. No hearing was held on the contempt charges and no further action was taken to enforce the judgment. (P.'s Exh. 136, 138.)

36. On October 7, 1991, the lienholder on Van Sickle's note on the Deepwood site, First State Bank, was told by the Department of Housing and Neighborhood Services that the Deepwood site had been inspected and was in compliance with City code. (P.'s Exh. 130.)

37. In a letter to the Texas Department of Health concerning cleanup of the Deepwood site, dated December 18, 1991, the City stated that prior to any sand and gravel mining taking place at the site, the City would require its cleanup and submission of a plan addressing environmental concerns and hazards. (P.'s Exh. 111, 131.)

38. First State Bank acquired the Deepwood site in 1992, when Van Sickle defaulted on the loan. (Am. JPO at 6.)

39. First State Bank sold the Deepwood site to Herman Nethery in 1994. (Am. JPO at 6.)

40. On August 1, 1994, Nethery submitted a construction permit application to the City on behalf of Herman Nethery Recycling. (Am. JPO at 6.) The proposed project was described as "fill & mine property." *Id.*

41. Nethery was advised that the application needed an accompanying affidavit stating that the proposed use had been in continuous operation since the original certificate of occupancy was issued. (Am. JPO at 6.) On

August 2, 1994, Nether submitted an affidavit to the City which stated that "VV Construction Company is in fact in business and continuing business on said property since 1982 to present time." (Am. JPO at 6.)

42. On August 2, 1994, the City issued a permit to Nethery for mining at the Deepwood site. (Am. JPO at 6.) The accompanying contractor's authorization notes that inspection of the property was required prior to issuing the certificate of occupancy. (P.'s Exh. 88.)

43. At the beginning of fiscal year 1994-1995, the City created an Illegal Dumping Team, which consisted of six code enforcement inspectors whose mandate was to stop and prevent illegal dumping. (Def.'s Exh. 117, 118.)

44. From August 22, 1994 through 1997, city inspectors issued numerous citations for illegal dumping at the Deepwood site. (Am. JPO at 7; Def.'s Exh. 81, 82.)

45. Despite the reports and citations for illegal dumping, the City issued a certificate of occupancy to Nethery for the Deepwood cite on December 5, 1994, without first conducting the requisite inspection. (Am. JPO at 7.)

46. During the time Nethery owned the Deepwood site, it was operated by Herman Lee Gibbons. (P.'s Exh. 194 at 298.)

47. On December 13, 1994, a city employee authorized Gibbons to "dump rock, gravel, sand, clean dirt free of vegetation and concrete, generated from demolition efforts associated with the Urban Rehabilitation

Standards Board Demolition Program" at the Deepwood site. (Def.'s Exh. 100.)

48. The operators of the Deepwood site produced copies of City-issued documents to prove to their customers that the site was a legal landfill. (P.'s Exh. 194 at 299.)

49. Gibbons, through his company Fruit of the Spirit Services, was a subcontractor on certain City demolition contracts for demolition and/or hauling of debris. (Tr. Vol. n at 71-72; P.'s Exh. 196; P.'s Exh. 197 at 432-33; P.'s Exh. 218 at 507-08.)

50. Fruit of the Spirit Services trucks dumped debris at the Deepwood site. (P.'s Exh. 118 at 2-3; P.'s Exh. 367 at 517; P.'s Exh. 378 at 21854.)

51. Other subcontractors on City demolition projects also disposed of debris at the Deepwood site. (P.'s Exh. 105 at 98-99, 102-103; P.'s Exh. 194 at 298; P.'s Exh. 196 at 426-26; P.'s Exh. 197 at 432, 434.)

52. Even though he had knowledge that some City contractors were engaged in illegal dumping, the City employee who supervised City demolition contracts for the Department of Public Works and Transportation, Kenn Hornbeck, did not seek to terminate those demolition contracts because he had been provided with no proof that material from City demolition sites was being dumped illegally. (Tr. Vol. II at 52-57, 70.)

53. Attempts by the Department of Public Works and Transportation to monitor whether City demolition debris was disposed of in legal landfills were limited to checking any receipts submitted for landfill disposal to

see if they were from a legal landfill prior to reimbursement. (Tr. Vol. II at 55-59, 88-90, 101.)

54. Although Hornbeck knew Gibbons was operating an illegal dump at the Deepwood site, Hornbeck continued to forward contracts with Fruit of the Spirit Services as a subcontractor to the City Council for approval without informing them of Gibbons' connection with the dump. (Tr. Vol. H at 75-76.)

55. On April 28, 1995, the City sued Nethery for operating an illegal solid waste facility. (Am. JPO at 9.)

56. In spite of a 1995 temporary injunction ordering Nethery to cease all operations at the Deepwood site, illegal dumping continued through November 1996. (P.'s Exh. 80.)

57. Nethery was twice held in contempt of court. As a consequence, he spent 49 days in jail and was ordered to pay $ 2,500 in fines. (Am. JPO at 9.)

58. In an attempt to eliminate the continued illegal dumping at the Deepwood site, Environmental and Health Services code inspectors, Dallas police officers, and Department of Public Safety officers arrested 29 people and issued 152 code violation citations on June 22, 1995. (P.'s Exh. 392.) The assistance of law enforcement officers was requested because the operators of the facility were armed. *Id.*

59. The Deepwood site again caught fire and burned from February 1997 through April 1997. (P.'s Exh. 37.)

60. The City Council received a briefing on the Deepwood site on April 16, 1997. (P.'s Exh. 38.) At the briefing, councilwoman Charlotte Mayes stated that:

> . . . it was pure neglect to allow something of that magnitude to occur from 1982 to present. This -- this -- this is kind of, to me, unheard of that we would have a situation that serious that we would choose to somewhat look the other way. . . . This -- this type of situation in my opinion, should have never escalated to the point to where it is today. And had it been in another area of the city, it would not have occurred. And all I'm saying is this, we need to deal with this. We need to deal with it expeditiously.

(P.'s Exh. 38 at 12-13.) Councilman Don Hicks stated:

> You're not going to be able to get intelligent people or unintelligent people to understand that the City didn't have the principle responsibility to stop this thing from going on. I would like to the FBI investigation (sic) to see if anybody in staff's got some money for this. Is -- it's just too open. . . . 560 complaints, 95 within the last year and a half, and nobody can stop it . . .

(P.'s Exh. 38 at 19-20.) Councilman Larry Duncan added:

> We need to make sure that it gets cleaned up for all the reasons you enumerated, and if we can use federal money and state money

> to do that, so much the better, but we still, however it happens, need to make that commitment and make that happen regardless of what it takes because we're left with the problem. . . . And the point is, how did it go on this long? How many others are there out there?

(P's Exh. 38 at 22.)

61. In a judgment entered on November 14, 1997, Nethery was permanently enjoined from operating a municipal solid waste facility at the Deepwood site. (Am. JPO at 9.)

62. Mr. Nethery and Mr. Gibbons were both charged with organized criminal activity in connection with their operation of the Deepwood site. (Am. JPO at 9.) Both men were found guilty and sentenced to prison. *Id.* Mr. Nethery's conviction was reversed on appeal. *Id.*

63. Prior to the initiation of Civil Action No. 3:98-CV-0291-H, the City made no efforts to remove the solid waste at the Deepwood site.

II. CONCLUSIONS OF LAW

A. *42 U.S.C. S 1983*; Equal Protection

Plaintiffs sue under *42 U.S.C. § 1983* for intentional discrimination on the basis of race. To establish a claim of intentional discrimination under *§ 1983*, a plaintiff must first prove a prima facie case of discrimination. *Wallace v. Texas Tech University, 80 F.3d 1042, 1047 (5th Cir. 1996)*. A plaintiff must show that an official

action constitutes a violation of the *Equal Protection Clause* by providing proof of racially discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977).* To prevail, Plaintiffs must show that the City's failure to stop the illegal dumping at the Deepwood site was the result of an official action, that the City intended to discriminate against Plaintiffs on the basis of race, and that the action violated the *Equal Protection Clause.*

1. Official action

In suing a municipality, a plaintiff must first prove there was an official action by showing "three elements: a policymaker; an official policy; and a violation of constitutional rights whose moving force' is the policy or custom." *Piotrowski v. Houston, 237 F.3d 567, 578 (5th Cir. 2001)* (citing *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)).* "Actual or constructive knowledge of a custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority." *Id. at 579.* Municipal liability cannot be predicated on a theory of *respondeat superior. Rivera v. Houston Ind. School Dist., 349 F.3d 244, 247 (5th Cir. 2003).* Rather, the unconstitutional conduct must be "directly attributable to the municipality through some sort of official action or imprimatur." *Piotrowski, 237 F.3d at 578.* A given policy is attributable to the municipality when the policy was made by an official to whom the governing body has given policymaking authority. *Bennett v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984).*

a. Policymakers

Plaintiffs assert that the City Council, the Board of Adjustment, the City Manager, and the City Attorney are policymakers for the City whose actions violated Plaintiffs' constitutional rights. (Compl. at 14-15.)

A policy maker "must have final policymaking authority." *Rivera, 349 F.3d at 247.* "When an official has final authority in a matter involving the selection of goals or of the means of achieving goals, his choices represent governmental policy." *Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 589 (E.D. La. 2002)* (citing *Burge v. Parish of St. Tammany, 187 F.3d 452, 468 (5th Cir. 1999)).* However, "policymaking authority is more than discretion." *Bennett, 728 F.2d at 769.* A policymaker takes the place of the governing body in a designated area of city administration; he decides the goals for a particular city function, devises the means of achieving those goals, and is not supervised in the area of his responsibility except as to the totality of his performance. *Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984).* Policymaking authority is delegated either by formal action of the governing body or by conduct or practice which acknowledges the official in a policymaking role. *Bennett, 728 F.2d at 769.* Whether or not an official has final policymaking authority is a question of state law. *Id.* Both parties agree that the City Council is a policymaker for the City.

The Board of Adjustment is authorized by state law. *TEX. LOC. GOV'T CODE § 211.008* authorizes a municipality's governing body to create a board of adjustment, which may then "make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance." The powers and duties of the Board of

Adjustment are set forth in Dallas City Code Chapter 51A-3.102. (D.'s Exh. 39.) Included in its powers is the authority to decide special exceptions, to grant variances, and to discontinue, enlarge, or change a nonconforming use. *Id.* Decisions of the Board of Adjustment are final unless appealed to the district court, but are not appealable to the City Council. *Id.* Although the Board of Adjustment does not have the power to enact zoning ordinances, it does have final authority to establish that part of municipal zoning policy concerning the grant or denial of variances or special exceptions. Because the Board of Adjustment has final authority concerning the enforcement of zoning decisions, its decisions constitute municipal policy and make it a policymaker for the City for purposes of § *1983. See e.g. Schiazza v. Zoning Hrg. Bd. of Fairview Township, 168 F. Supp. 2d 361, 373 (M.D. Pa. 2001)* (holding that a zoning board which had final authority to grant or deny variances and special exceptions was a policymaker); *Loreto Dev. Co., Inc. v. Village of Chardon, 1998 U.S. App. LEXIS 12183, 1998 WL 320981, *2-3 (6th Cir. June 4, 1998)* (finding a zoning board to be a policymaker when it had discretion to deny or grant zoning permits and issue variances); *Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 638 (11th Cir. 1991)* (holding that a mayor was not a final policymaker with respect to zoning decisions where the city charter provided that the city counsel could override the mayor's veto of zoning ordinances).

The City Manager is appointed by the City Council to be the chief administrative and executive officer of the city. (D.'s Exh. 31 at 27.) Appointment of a city manager is authorized by *TEX. LOC. GOV'T CODE § 25.029.* That statute sets forth the powers and duties of

a city manager, which include administering the municipal business and any additional powers and duties delegated by the governing body by ordinance. *TEX. LOC. GOV'T CODE § 25.029(a), (b).* The City Manager has the responsibility to see that all laws and ordinances are enforced and to "recommend to the council for adoption such measures as he may deem necessary or expedient." (D.'s Exh. 31 at 28.) Neither state law nor city ordinance grants final policymaking authority to the City Manager concerning matters of zoning enforcement. Therefore, the City Manager is not a policymaker for the City for purposes of this lawsuit.

The appointment of a city attorney is authorized by *TEX. LOC. GOV'T CODE § 24.051*, which permits the governing authority to define the duties of the position. Pursuant to the City charter, the City Attorney is the director of the legal department. (D.'s Exh. 31, p. 29.) His duties include "upon his own initiative or upon the direction of the city council" to appear in any and all litigation affecting the City and "to institute such legal proceedings as may be necessary or desirable on behalf of the city." (D.'s Exh. 31, p. 29-31.) While it is clear that the City Attorney has some discretion concerning the institution of legal proceedings on behalf of the City, neither state law nor city ordinance grants him final authority to set policy with regard to zoning enforcement. In fact, the institution of certain legal proceedings may be directed by the City Council. Therefore, the City Attorney is not a policymaker for purposes of *§ 1983.*

For purposes of this lawsuit, the City Council and the Board of Adjustment are policymakers whose actions may subject the City to liability for constitutional violations.

b. Official pdicy

Plaintiffs assert that the City "implemented a policy that allowed dumping of demolition debris, including wood, shingles, and other biodegradable material at illegal landfills" which were disproportionately located in minority areas. (Compl. at 15-16.) Plaintiffs also assert that the City "failed to use the zoning and land use powers to protect African-American single-family and other residential neighborhoods." (Compl. at 18.)

A city may be liable under § *1983* if the execution of one of its customs or policies deprives a plaintiff of his constitutional rights. *Monell, 436 U.S. at 691.* However, liability does not attach merely because a city employed a tortfeasor. *Id. at 694; Campbell v. City of San Antonio, 43 F3d 973, 977 (5th Cir. 1995).* Municipal liability under § *1983* "is limited to action for which the municipality is actually responsible . . . that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. Cincinnati, 475 U.S. 469, 479-80, 89 L. Ed. 2d 452, 106 S. Ct. 1292(1986).* A city's policy or custom must be "the moving force of the constitutional violation." *Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir. 1987)* (quoting *Monell, 436 U.S. at 694*). A single incident, unaccompanied by supporting history, is not a sufficient basis for inferring a custom or policy unless the actors involved were given official policy-making authority. *Worsham v. Pasadena, 881 F.2d 1336, 1339-40 (5th Cir. 1989)* (citations omitted); *see also Palmer, 810 F.2d at 516.* The alleged custom or policy must be adopted by the municipality's governing body before a municipality may be held liable. *See Bennett, 728 F.2d at 767.*

An official policy is: (1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the governing body or by an official who has policymaking authority; or (2) a persistent, widespread practice of officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents the municipality's policy. *Cozzo v. Tangipahoa Parish Council, 279 F.3d 273, 289 (5th Cir. 2002)* (citing *Johnson v. Moore, 958 F.2d 92, 94 (5th Cir. 1992)).* Plaintiffs do not claim that the alleged discriminatory policies were officially adopted and promulgated by the City Council. Rather, they allege that there existed a persistent, widespread practice of city employees and officials which was so common and well settled that it fairly represented the City's policy.

"An act performed pursuant to a custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997).* "If actions of city employees are to be used to prove a custom for which the municipality is to be held liable, those actions must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." *Webster v. City of Houston, 735 F.2d 838, 842 (5th Cir. 1984).* The governing body must have either actual or constructive knowledge of the alleged policy. *Id.* The governing body may be said to have

constructive knowledge of a practice if "it would have known of the violations if it had properly exercised its responsibilities, as for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity." *Bennett, 728 F.2d at 768.* When the governing body has "knowledge of a pattern of constitutionally offensive acts by their subordinates but fail[s] to take remedial steps, the municipality may be held liable for a subsequent violation if the [] inaction amounts to deliberate indifference or to tacit authorization of the offensive acts." *Turpin v. Mailet, 619 F.2d 196, 201 (2nd Cir. 1980).*

(1) *Dumping of City demolition debris*

Plaintiffs first allege a persistent, widespread practice by City officials or employees attributable to a policymaker to permit dumping of City demolition debris at illegal landfills disproportionately located in minority areas. (Compl. at 15-16.) City contractors dumped debris at the Deepwood site. (Findings of Fact PP 49, 50, 51.) The Department of Public Works and Transportation employee who supervised City demolition contracts turned a blind eye to illegal dumping by City contractors absent proof that it was City debris which was being illegally dumped. (Finding of Fact P 52.) However, virtually no effort was made to determine whether City demolition debris was disposed of in legal landfills, even when it was known that Gibbons, a subcontractor on City demolition projects, was operating the Deepwood site as an illegal dump. (Findings of Fact PP 53, 54.)

The evidence supports the inference that City demolition debris was dumped at the Deepwood site. It

is also clear that employees at the Department of Public Works and Transportation could have, through the exercise of proper diligence, known about and stopped the dumping of City demolition debris. However, the practice of failing to properly supervise the disposal of City demolition debris which then made its way into the Deepwood site does not rise to the level of an official policy which may be attributed to a City policymaker. Statements made by City Council members after the site caught fire in 1997 belie any prior knowledge of illegal dumping of City demolition debris at Deepwood. As previously determined, the City Council and the Board of Adjustment were policymakers for the City. There is no evidence that either policymaker had actual or constructive knowledge of this practice at the time it occurred. There is no evidence that the policymakers were informed that contractors or subcontractors were disposing of City demolition debris at the Deepwood site. (Findings of Fact P 54.) Nor is there any evidence showing that the fact that City demolition debris was being illegally dumped was the subject of prolonged public discussion or of a high degree of publicity such that the policymakers may be said to have had constructive knowledge of it. Plaintiffs have not established by a preponderance of the evidence that there existed a persistent, widespread practice of City officials or employees attributable to a policymaker to permit dumping of City demolition debris at illegal landfills in minority areas.

(2) *Failure to terminate illegal dumping*

Plaintiffs also allege a persistent, widespread practice by City officials or employees attributable to a policymaker of failing to use the zoning and land use powers to protect African-American neighborhoods.

(Compl. at 18.) In 1982, the City issued a certificate of occupancy for sand and gravel mining at the Deepwood site based upon an application which clearly expressed the owner's intent to use the site as a landfill. (Findings of Fact P 12, 13.) In 1983, in the face of repeated complaints by residents to the City Council and evidence that citations for illegal dumping were issued to the owner of the Deepwood site, the City Council ordered tests for contaminants on the site and requested that the Board of Adjustment consider terminating the nonconforming use. (Findings of Fact PP 17, 18, 19, 21.) The Board of Adjustment was not informed that the Deepwood site was being used as an illegal dump and decided to take no action to terminate the nonconforming use. (Findings of Fact P 24.) The Board of Adjustment failed to call another hearing on the matter as planned, and despite continued reports of illegal dumping at the Deepwood site, the City Council did not request that the board take up the issue again. (Findings of Fact P 25, 26.)

From 1985 through 1993, City code inspectors issued few citations for illegal dumping, and those that were issued for dumping at the Deepwood site failed to remedy the problem. (Findings of Fact P 28, 29.) In 1987, the City sued the owner and operator of the Deepwood site and, in 1989, obtained a judgment requiring the cessation of illegal dumping and cleanup of the site, but that judgment was never enforced. (Findings of Fact P 30, 32, 35.) In spite of the judgment requiring cleanup of the Deepwood site and recent citations for illegal dumping, a permit for mining and a certificate of occupancy were again issued to the site's owner in 1994, without any inspection of the property

having been conducted. (Findings of Fact P 37, 42, 43, 44, 45.)

In 1994, the City created the Illegal Dumping Team, consisting of six code enforcement inspectors to stop and prevent illegal dumping. (Findings of Fact P 43.) City inspectors issued numerous citations for illegal dumping at the Deepwood site. (Findings of Fact P 44.) In 1995, the City sued the owner of the Deepwood site for operating an illegal solid waste facility and a temporary injunction was granted ordering the owner to cease all operations at the site. (Findings of Fact P 55, 56.) In spite of the temporary injunction and the subsequent contempt proceedings against the site's owner, illegal dumping at the Deepwood site continued. (Findings of Fact P 56, 57.) In 1995, a raid on the Deepwood site netted 29 arrests and 152 citations. (Findings of Fact P 58.) In 1997, the owner of the Deepwood site was permanently enjoined from operating the facility. (Findings of Fact P 61.)

The evidence clearly shows that the City Council was informed of the existence of an illegal dump site at Deepwood as early as 1982. However, Plaintiffs have not shown by a preponderance of the evidence that the City Council failed to use the City's zoning and land use powers to protect the surrounding neighborhood. Citations were issued and testing at the site was conducted for contaminants. The City Council referred the matter of the continuing nonconforming use to the Board of Adjustment. While the issuance of citations for illegal dumping throughout the city was virtually nonexistent during the period of 1985 through 1993, during this same period the City sued the operator of the Deepwood site, obtained a judgment ordering cleanup of the site, and sought (but failed to follow

through with) contempt sanctions for failure to comply with the judgment. Subsequently, hundreds of citations were issued and another lawsuit was filed and a judgment obtained. That the City's efforts to stop the illegal dumping at Deepwood were inconsistent, inadequate, and largely ineffective for years is obvious. Also obvious is the failure of individual City departments and employees to communicate with each other, to conduct rudimentary investigations prior to issuing permits, and to diligently enforce a judgment once obtained. Furthermore, if the City had discontinued the nonconforming use or refused to issue the certificates of occupancy, the owners of the Deepwood site would have been robbed of the appearance of legitimacy. Had the City enforced the 1989 judgment, the facility may not have continued to operate into 1997. However, Plaintiffs have not shown by a preponderance of the evidence that these failures were the result of a widespread practice attributable to the City Council or to the Board of Adjustment of not using the City's zoning and land use powers to protect African-American neighborhoods.

Because Plaintiffs have failed to prove by a preponderance of the evidence that there existed an official policy attributable to a policy which permitted dumping of City demolition debris at or caused the continued existence of the Deepwood site, they have not established the official action element of their *§ 1983* claim.

2. Discriminatory Intent

Even if the Court had found that an official action of the City resulted in the creation and continued existence of the Deepwood site, Plaintiffs' claim under *§*

1983 would still fail. In showing that an official action[2] constitutes a violation of the *Equal Protection Clause*, Plaintiffs must also provide proof of racially discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977).* To determine intent, courts consider both circumstantial and direct evidence of intent. *Id.*

Where a facially neutral state law has been shown to produce disproportionate effects along racial lines, courts consider the factors set out in *Arlington Heights.Hunter v. Underwood, 471 U.S. 222, 228, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985).* The factors to be considered include: (1) whether the official action "bears more heavily on one race than another;" (2) the historical background of the decision; (3) the sequence of events leading up the challenged decision; (4) departures from the normal procedural sequence; and (5) the legislative or administrative history. *Arlington Heights, 429 U.S. at 265-68.* However, "an action does not violate the *equal protection clause* simply because the decisionmaker knows that it will have a disparate impact on racial or ethnic groups." *United States v. LULAC, 793 F.2d 636, 646 (5th Cir. 1986).* Disproportionate impact of state action on different racial ethnic groups does not of itself violate the Constitution. *Id.* A violation of the *Fourteenth Amendment* occurs "only if a state decisionmaker selects or continues in a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* "Foreseeability of discriminatory impact, without more, does *not* constitute the forbidden discriminatory purpose." *Price v. Austin Indep. School Dist., 945 F.2d*

1307, 1319 (5th Cir. 1991). Rather, the decisionmaker must have selected the particular course of action at least in part because of its adverse effects upon the racial or ethnic group. *Id.*

a. Discriminatory effect

The first *Arlington Heights* factor addresses the discriminatory effect of the official action. Plaintiffs have shown that their neighborhood is predominately inhabited by African-Americans and that the neighborhood has been the site of an illegal dump site since 1982. (Findings of Fact PP 8, 15.) Clearly, the failure to stop the illegal dumping at the Deepwood site had a disproportionate impact on African-Americans.

b. Historical background

The next *Arlington Heights* factor is the historical background of the City's action. Previous courts have found that the City of Dallas historically participated in deliberate racial segregation and failed to expend the resources necessary to remedy the results of that discrimination. *See Williams v. City of Dallas, 734 F. Supp. 1317, 1406-07) (N.D. Tex. 1990); Walker v. U.S. Dep't of Housing and Urban Dev., 734 F. Supp. 1289, 1303 (N.D. Tex. 1989); Miller v. City of Dallas, 2002 U.S. Dist. LEXIS 2341, 2002 WL 230834, *4 (N.D. Tex. Feb. 14, 2002).* Prior discrimination is relevant to the issue of intent. *Rogers v. Lodge, 458 U.S. 613, 625, 73 L. Ed. 2d 1012, 102 S. Ct. 3272 (1982)* (holding that "evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination"). Prior findings of discrimination by the City do not, however, end the inquiry. *Price, 945 F.2d at 1316 (5th Cir. 1991).* In this case, the Deepwood neighborhood was predominately white at the time the City

authorized a sand and gravel mining operation, and at the time open dumping was first observed at the Deepwood site. (Findings of Fact PP 4, 5, 6, 8,10.) Thus, while the City's past history of discrimination weighs in favor of a finding of discriminatory intent, the historical background of the Deepwood site does not.

c. Sequence of events

The third *Arlington Heights* factor is the specific sequence of events leading up to the challenged action. The original certificate of occupancy for a nonconforming sand and gravel mining operation at the Deepwood site was issued when the residents of the neighborhood were predominately white. (Findings of Fact P 4, 5, 6, 8.) After the racial makeup of the neighborhood changed from predominately white to predominately African-American, a new application for certificate of occupancy was submitted to the City which clearly stated that the owner of the Deepwood site intended to use the site for solid waste, and a certificate of occupancy was issued on the basis of that application. (Findings of Fact P 8, 12, 13.)

In response to Plaintiffs' numerous complaints to the City regarding the illegal dumping, citations were issued and the City ordered tests of the site for contaminants. (Findings of Fact PP 15, 16,17,18,19,20.) The City Council requested that the Board of Adjustment consider terminating the nonconforming use of the Deepwood site, but did not inform the board of the citations for illegal dumping at the site. (Findings of Fact P 21.) The Board of Adjustment determined not to terminate the nonconforming use at the site at that time and did not reconsider the issue at any time thereafter. (Findings of Fact PP 24, 25, 26.) City

inspectors sporadically issued citations to for illegal dumping at Deepwood, but the dumping continued. (Findings of Fact PP 28, 29.) The City finally sued the owner of the Deepwood site but failed to enforce its judgment against him, which required closure of the site. (Findings of Fact PP 30, 32, 34, 35.)

Notwithstanding that the site had not been cleaned as required by the prior judgment and that further citations for illegal dumping had been issued, the City granted a new certificate of occupancy to the new owner of the Deepwood site without first inspecting the premises. (Findings of Fact PP 36, 42, 43, 44.) From 1994 through 1997, numerous citations for illegal dumping at the Deepwood site were issued and a temporary injunction was entered ordering the cessation of all operations at the site, but the dumping continued. (Findings of Fact P 44, 56, 57.) The illegal dumping finally ceased after a permanent injunction prohibiting the operation of a municipal solid waste facility at the Deep wood site was entered and the owner and operator of the site were charged with organized criminal activity. (Findings of Fact PP 61, 62.) While this evidence supports the conclusion that the City's efforts to stop the illegal dumping at the Deepwood site were ineffective, if not negligent at times, the evidence also shows that the City did not wholly abdicate its responsibility to the residents of the Deepwood neighborhood and ignore the fact that illegal dumping was taking place.

d. Normal procedural sequence

Very little evidence of the normal procedural sequence, the fourth *Arlington Heights* factor, was presented to the Court at trial. Plaintiff's presented no

evidence regarding the normal procedure used by the City in processing an application for certificate of occupancy. No evidence was presented to show that employees of the department charged with such duty were aware of which materials were proper fill materials for a sand and gravel mining operation, and that they routinely denied applications which specified that improper fill materials will be used. It is unclear from the evidence of record whether, when processing an application for certificate of occupancy, city inspectors were routinely asked if the entity seeking a permit had received prior citations or if the site in question had prior problems.

No evidence was adduced showing the normal procedure used when the Board of Adjustment was asked to consider terminating a nonconforming use. It is not evident from the record that the Board was usually provided with information regarding repeated citizen complaints about illegal activities at a location prior to a hearing. There was no evidence presented showing that the Board normally did have subsequent hearings after it has deferred a decision. Nor was there evidence that the City Council normally requested further consideration by the Board if the Board failed to make a determination.

The Court received no evidence showing that after the City obtained a judgment, it usually followed through with contempt proceedings and enforcement of that judgment if the party sued refused to comply with the terms of the judgment.

There was evidence showing that the normal procedure for determining whether a contractor was dumping City demolition debris in a legal landfill was to

check that any landfill disposal receipts submitted were from a legal location. (Findings of Fact P 53.) No other verification procedures were in place and no evidence was submitted indicating that the City varied from that procedure in this case.

Absent any evidence that the City's procedures or normal practices differed in any way from the practices which allowed dumping at the Deepwood site to continue, the Court cannot conclude that this factor weighs in favor of finding intentional discrimination. The City's inability to coordinate the actions of its departments and to ensure that they are provided with the essential information necessary to ensure that actions were taken in the best interests of the City and its citizens is bewildering. The failures which resulted in the continued existence of the Deepwood site are numerous and nothing short of negligence. However, Plaintiffs have not adduced any evidence that the normal procedural sequence differed from that which allowed the Deepwood site to exist.

e. Legislative or administrative history

The last *Arlington Heights* factor addresses the legislative or administrative history surrounding the challenged action. "Statements made by members of the decisionmaking governmental bodies are most pertinent to this factor." *Jim Sowell Construction Co., Inc. v. City of Coppell, 61 F. Supp.2d 542, 550 (N.D. Tex. 1999).* Statements by City Council members indicating outrage at the existence and duration of the illegal dumping at the Deepwood site were introduced at trial. (Findings of Fact P 60.) Councilwoman Mayes stated, "This -- this type of situation . . . should never escalated to the point to where it is today. And had it

been in another area of the city, it would not have occurred." *Id.* Councilman Hicks stated, "I would like to the FBI investigation (sic) to see if anybody in staffs got some money for this. Is -- it's just too open. . . . 560 complaints, 95 with the last year and a half, and nobody can stop it." *Id.* Councilman Duncan added "And the point is, how did it go on this long? How many others are there out there?" *Id.*

These statements clearly express outrage by City Council members at the existence and the duration of the Deepwood site. Although the statement by Councilwoman Mayes indicates her belief that such a situation would not have occurred in another part of the city, neither her statement, nor those of the other City Council members imply that the City Council intentionally turned a blind eye to the dumping due to the ethnic background of the neighborhood's residents. Rather the statements show that the City Council was unaware of the continuing problem prior to the 1997 fire. The evidence presented at trial pertaining to the legislative or administrative history pertaining to the Deepwood site does not indicate an intent to discriminate against Plaintiffs by City policymakers.

After considering the evidence relevant to the *Arlington Heights* factors, the Court determines that Plaintiffs have failed to prove by a preponderance of the evidence that the City intended to discriminate against them on the basis of race. Accordingly, the Court concludes that Plaintiffs are not entitled to recover for their claim brought under *42 U.S.C. § 1983* for violation of the *14th Amendment.*

B. 42 U.S.C. § 1981

Plaintiffs also seek relief under *42 U.S.C. § 1981*. To establish a right to relief under *§ 1981*, Plaintiffs must show: (1) that they belong to a racial minority; (2) that the City intended to discriminate against them on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute. *Arguello v. Conoco, Inc., 330 F.3d 355, 358 (5th Cir. 2003)*. As noted above, the evidence presented at trial clearly supports an inference of gross negligence by the City exemplified by lackadaisical code enforcement, absence of communication between City departments, and virtually no follow-through by either the Board of Adjustment or the City Attorney's office, among other things. However, Plaintiffs failed to establish by a preponderance of the evidence that the City's actions were more than negligence and were the result of an intent to discriminate against them on the basis of race, rather than gross negligence. Accordingly, Plaintiffs are not entitled to relief for their claims under *§ 1981*.

IV. CONCLUSION

For the reasons stated above, the Court finds for the City on Plaintiffs claims for violation of *42 U.S.C. § 1981* and for violation of the *14th Amendment* brought under *42 U.S.C. § 1983*.

SO ORDERED, this the 21st day of September, 2004.

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE JUDGE

FINAL JUDGMENT

This Judgment is issued pursuant to *FED. R. CIV. P. 58(a)*, and resolves Plaintiffs' claims against Defendant for violations of *42 U.S.C. § 1983* and *42*

U.S.C. § 1981. These claims came on for trial before the Court on March 1-3, 2004. The issues having been duly tired and a decision having been duly rendered, it is

ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of Defendant and that Plaintiffs shall take nothing by their claims. It is further

ORDERED, ADJUDGED, and DECREED that the Clerk shall transmit a true copy of this judgment to the parties.

SO ORDERED, this 21st day of September, 2004.

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE JUDGE

Footnotes

n1 At the close of trial, the Court took under advisement the admissibility of certain evidence submitted by the parties, and requested post-trial briefing on the issues of the applicability of the law of the case doctrine to this case and the admissibility of certain other evidence. Because the Court does not rely on any of the contested evidence in reaching its decision, the issue of its admissibility is not reached.

n2 The *Arlington Heights* factors address a "decision" by the municipality. As noted in Section I above, Plaintiffs' claim that the discriminatory "decision" was in fact an omission, i.e., the failure to stop illegal dumping at the Deepwood site.

Civil Action No. 3:98-CV-1763-BH

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HAROLD COX, et al.,
Plaintiffs,

v.

THE CITY OF DALLAS, et al.,
Defendants.

February 24, 2004, Decided
February 24, 2004, Filed

COUNSEL: For Harold Cox, Plaintiff: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX. Michael M Daniel, Law Office of Michael M Daniel, Dallas, TX.

For Shirley Davidson, Robert Stubblefield, Cynthia Herring, Eloise Edwards, Betty Curley, Leo Easter, Plaintiffs: Laura Beth Beshara, Law Office of Michael M Daniel, Dallas, TX.

For Dallas TX City of, Defendant: Janice Smith Moss, Dallas City Attorney's Office, Dallas, TX. Thomas P Perkins, Jr, Dallas City Attorney's Office, Dallas, TX. Albert M Bronson, Attorney General of Texas, Austin, TX. Caroline Jordan, Dallas City Attorney's Office - City Hall, Dallas, TX. John L Anderson, Dallas City Attorney's Office, Dallas, TX.

For Dan Pearson, in his capacity as Executive Director of the Texas Natural Resources Conservation Commission, Defendant: Albert M Bronson, Attorney General of Texas, Austin, TX.

JUDGES: IRMA CARRILLO RAMIREZ, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: IRMA CARRILLO RAMIREZ

OPINION:

ORDER

Before the Court are:
(1) *Plaintiffs' Motion for Partial Summary Judgment* (P.'s MSJ"), filed October 14, 2003;

(2) *Plaintiffs' Brief in Support of Motion for Partial Summary Judgment* ("P.'s MSJ Br."), filed October 14, 2003;

(3) *Plaintiffs' Appendix in Support of Plaintiffs' Motion for Partial Summary Judgment* ("P.'s MSJ Appx."), filed October 14, 2003;

(4) *Defendant City of Dallas' Response to Plaintiffs' Motion for Partial Summary Judgment* ("Def.'s Resp."), filed November 3, 2003;

(5) *Defendant's Brief in Support of City of Dallas' Response to Plaintiffs' Motion for Partial Summary Judgment* ("Def.'s Resp. Br."), filed November 3, 2003;

(6) *Appendix in Support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment* ("Def.'s Resp. Appx."), filed November 3, 2003;

(7) *Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment* ("P.'s Reply"), filed November 18, 2003;

(8). *Defendant City of Dallas' Motion for Summary Judgment* ("Def.'s MSJ"), filed November 14, 2003;

(9) *Brief in Support of City of Dallas' Motion for Summary Judgment* ("Def.'s MSJ Br."), filed November 14, 2003;

(10) *Appendix in Support of Defendant's Motion for Summary Judgment* ("Def.'s MSJ Appx."); filed November 14, 2003;

(11) *Plaintiffs' Response in Opposition to City's Motion for Summary Judgment* ("P.'s Resp."), filed December 4, 2003;

(12) *Plaintiffs' Brief in Support of Plaintiffs' Response in Opposition to the City's Motion for Summary Judgment* ("P.'s Resp. Br."), filed December 4, 2003;

(13) *Plaintiffs' Appendix in Support of Plaintiffs' Response in Opposition to the City's Motion for Summary Judgment* ("P.'s Resp. Appx."), filed December 4, 2003; and

(13) *City of Dallas' Reply to Plaintiffs' Response in Opposition to the City's Motion for Summary Judgment*, filed December 19, 2003.

Having reviewed the pertinent pleadings and the law applicable to the issues raised, the Court finds that *Plaintiffs' Motion for Partial Summary Judgment* should be DENIED, and *Defendant City of Dallas' Motion for Summary Judgment* should be GRANTED, in part and DENIED, in part.

I. BACKGROUND[1]

A. Factual History

Plaintiffs are homeowners in a residential neighborhood adjacent to a landfill located at 523 Deepwood Street, Dallas, Texas ("Deepwood site"). (Pl.'s MSJ Appx. at 1299.) The Deepwood neighborhood was annexed by the City on August 6, 1956, and was zoned R-7.5 (Residential). (Def.'s MSJ Appx. at 742.) On March 20, 1963, the City granted permission to locate an office building at the Deepwood site for a non-conforming sand and mining operation. (Def.'s MSJ Appx. at 742.) A certificate of occupancy ("CO") was issued on August 16, 1963, for a gravel pit at the Deepwood site on the basis that the use was non-conforming. (*Id.* at 742.) A portion of the Deepwood site was zoned Industrial-2, and Specific Use Permit ("SUP") 182 was issued for a mining operation adjacent to the residential neighborhood, on March 30, 1965. (*Id.* at 677.)

The 1970 U.S. Census showed that the residents of the Deepwood neighborhood were predominately white, non-Hispanic. (*Id.* at 5-6.) Plaintiffs purchased homes in the neighborhood between 1970 and 1978. (Pl.'s MSJ Appx. at 721, 724, 730, 739-40, 743, 750, 756.) By 1980, the U.S. Census indicated that the residents of

the neighborhood were predominately African-American. (Def.'s MSJ Appx. at 5-6.)

As early as 1976, there was open dumping of solid waste at the Deepwood site. *See Cox v. City of Dallas, 256 F.3d 281, 285 (5th Cir. 2001).* At that time, officials from the City and the state visited the site and called for continuing surveillance. *Id.*

From 1982 through 1992, the Deepwood site was owned by Terry Van Sickle, owner of V.V. Construction Co. (Pl.'s MSJ Appx. at 959.) On March 16, 1982, V.V. Construction Co. submitted a permit application for removal of sand and gravel from the Deepwood site. (*Id.* at 25.) The application stated that the old pits were to be filled with solid waste, meaning "all putrescible and non putrescible discarded materials or unwanted rock, dirt, metal, sand gravel wood etc." (*Id.*) On April 6, 1982, V.V. Construction Co. was issued a CO for mining of sand and gravel at the Deepwood site. (*Id.* at 26.)

On November 22, 1982, one of the plaintiffs in this action filed a complaint with the City, alleging massive illegal dumping at the Deepwood site. (*Id.* at 3.) The City's response to the complainant indicates that a citation to municipal court had been issued to the owner of the property on November 11, 1982, for conducting a sanitary landfill operation in R-7.5 zoning. (*Id.* at 4.) Subsequent reinspections revealed no additional illegal dumping as of December 9, 1982. (*Id.*) However, Plaintiffs continued to complain at City Council meetings regarding the Deepwood site. (*Id.* at 6-21, 52.)

In response to a request regarding the residents' concerns, the Assistant City Manager issued a memorandum to the mayor and city council dated

February 4, 1983. (*Id.* at 52.) The memorandum indicates that Terry B. Van Sickle, the owner of the Deepwood site, was fined for operating a sanitary landfill on the site and that illegal dumping at the site had ceased. (*Id.*) It appears that the residents' complaints continued, and a subsequent memorandum from a City employee to a City Councilwoman was issued on May 18, 1983. (*Id.* at 51.) That memorandum reported that no contaminants were found in the soil or water table at the Deepwood site and that continued monitoring of the site was to take place every four to six months for five years. (*Id.*) Despite these assurances, residents of the neighborhood continued to complain to the City that trash was being disposed of at the site. (*Id.* at 69-70.)

The City of Dallas Board of Adjustment held a hearing on July 26, 1983, to consider whether to terminate the nonconforming sand and gravel mining operation at the Deepwood site. (*Id.* at 67.) The morning of the hearing, the board members inspected the site. (*Id.* at 82.) In preparation for the inspection, Mr. Van Sickle caused the trash at the site to be moved and covered with dirt. (*Id.* at 91.) At the hearing, Mr. Van Sickle testified that he had removed a considerable amount of debris from the site, and that he planned to mine gravel for two more years and fill the hole for another three years. (*Id.* at 79.) Letters from residents expressing opposition to continued mining at the site were sent to the Board of Adjustment, but none of the residents attended the meeting. (*Id.* at 68-70.) At the conclusion of the hearing, the Board of Adjustment voted to take no action terminating the nonconforming use and to call another hearing in nine months. (*Id.* at 71.) There is no indication in the record that the issue of

terminating the mining operation at the Deepwood site was ever again considered by the Board of Adjustment.

During the time Mr. Van Sickle owned the Deepwood site, two city demolition contractors used the Deepwood site to dump loads of debris. (*Id.* at 98-99, 963.)

Illegal dumping continued at the Deepwood site, and in 1987, the City sued Mr. Van Sickle, V&V Construction Co., and Samson Horrice for operating an illegal solid waste facility or municipal solid waste site. (Def.'s MSJ Appx. at 120.) On December 29, 1989, the City obtained a judgment against those defendants for operating an illegal municipal solid waste disposal site. (Pl.'s MSJ Appx. at 40-46.) The judgment ordered those defendants to cease the disposal of municipal solid waste at the Deepwood site and to submit and implement a plan to close the site. (*Id.* at 43-44.)

An inspection of the Deepwood site was conducted by the Bureau of Solid Waste Management of the Texas Department of Health on April 22, 1991. (Pl.'s MSJ Appx. at 1164-66.) The inspectors reported continued unauthorized dumping and no efforts to clean up the site as required by the December 29, 1989 judgment. (*Id.*) The inspection report indicates that the City was informed of the failure to clean up the site. (*Id.*)

On November 21, 1991, the City moved for contempt against Mr. Van Sickle and Mr. Horrice for failure to comply with the terms of the judgment. (Compl. at 5.) No hearing was held on the contempt charges because the City failed to serve one of the defendants. *Id.* It appears that no further action was taken to enforce the judgment and to ensure closure of the Deepwood site.

In 1992, the Deepwood site was acquired by First State Bank when Mr. Van Sickle defaulted on a loan. (Compl. at 5; Def.'s MSJ at 4.) The bank sold the Deepwood site to Herman Nethery in 1994. (*Id.*)

On August 1, 1994, Mr. Nethery submitted a construction permit application to the City on behalf of Herman Nethery Recycling. (Pl.'s MSJ Appx. at 35.) The proposed project was described as "fill & mine property." (*Id.*) The section of the application set aside for "office use only" contains a notation that the application was not ready because it needed an accompanying affidavit stating that the proposed use had been in continuous operation since the original CO was issued. (*Id.*) An affidavit was submitted to the City on August 2, 1994, stating, "VV Construction Company is in fact in business and continuing business on said property since 1982 to present time." (*Id.* at 36.) The affiant was VV Construction Co. by Herman Nethery Recycling. (*Id.*) On August 2, 1994, the City issued a permit to Mr. Nethery for mining at the Deepwood site. (*Id.* at 37.) The accompanying contractor's authorization notes that inspection of the property was required prior to issuing the CO. (*Id.* at 38.) Following citizens' reports of illegal dumping at the Deepwood site, city inspectors issued numerous citations to persons operating the Deepwood site for illegal dumping beginning in August 22, 1994. (*Id.* at 111-25.) Despite the reports and citations for illegal dumping, the City issued a CO to Mr. Nethery on December 5, 1994, apparently without first conducting the prerequisite inspection. (*Id.* at 39, 964.) The City continued to issue citations for illegal dumping at the Deepwood site through November 27, 1996. (*Id.* at 111-25.)

During the time Mr. Nethery owned the Deepwood site, it was operated by Herman Lee Gibbons. (Pl.'s MSJ Appx. at 276.) Mr. Gibbons was also a subcontractor on certain City demolition contracts for demolition and/or hauling of debris. (*Id.* at 417-418.) During September 1996, a different subcontractor on a City demolition project was observed disposing of demolition debris at the Deepwood site. (*Id.* at 298.)

On April 28, 1995, the City sued Mr. Nethery for operating an illegal solid waste facility. (Def.'s MSJ Appx. at 72-79.) In a judgment entered on November 14, 1997, Mr. Nethery was permanently enjoined from operating a municipal solid waste facility at the Deepwood site. (*Id.* at 99.) Additionally, Mr. Nethery and the operator of the site, Herman Lee Gibbons, were both charged with organized criminal activity in connection with their operation of the Deepwood site. (Pl.'s MSJ Appx. at 151-62.) Both men were found guilty and sentenced to prison. Mr. Nethery's conviction was reversed on appeal. *Nethery v. State, 29 S.W.3d 178 (Tex. App. - Dallas 2000).*

B. Procedural History

On February 5, 1998, Plaintiffs filed civil action number 3:98-CV-0291 against the City of Dallas and others, alleging illegal dumping and race discrimination. On July 28, 1998, Plaintiffs filed a second suit, civil action number 3:98-CV-1763, against the City of Dallas ("Defendant") and others for alleged illegal dumping and race discrimination. The district court entered an order consolidating the two cases under 3:98-CV-0291 on August 17, 1998. On December 17, 1998, the district court ordered bifurcation of the claims in the consolidated cases. The district court's order specified

that 3:98-CV-0291, which would be tried first, would be a class action suit for injunctive relief brought under *42 U.S.C. § 6901* for illegal dumping. The order further specified that after resolution of the illegal dumping claims, Plaintiffs' claims of race discrimination would be tried under 3:98-CV-1763, which was not a class action. After a bench trial in 3:98-CV-0291, the district court entered a final judgment granting Plaintiffs' request for injunctive relief on August 27, 1999. On September 7, 1999, civil action 3:98-CV-0291 was closed, and civil action 3:98-CV-1763 was reopened. Civil action 3:98-CV-1763 was transferred to this Court on March 11, 2003, for the conduct of all further proceedings in Plaintiffs' suit against the City for race discrimination.

In *Plaintiffs' Revised Fourth Amended Complaint*, filed October 2, 2003, Plaintiffs allege violations of the *Fourteenth Amendment* to the U.S. Constitution, *42 U.S.C. § 1981*, the Fair Housing Act, *42 U.S.C. § 3601 et seq.*, and *24 C.F.R. § 100.70(b), (d)(4)*. In particular, Plaintiffs assert that the City's actions in failing to stop the illegal dumping at the Deepwood site were taken for the purpose of discriminating against Plaintiffs because of their race. (Compl. at 13.) Plaintiffs have moved for partial summary judgment on their claims of discriminatory purpose in the provision of municipal services and on their claims of discriminatory impact from a city policy for the provision of municipal services, brought under the Fair Housing Act, *42 U.S.C. § 3604(b)*. The City has moved for summary judgment on all of Plaintiffs' claims.

II. STANDARD OF REVIEW

This case involves issues of law and issues of fact. "Summary judgment is an appropriate mechanism for

resolving issues of law arising from a materially complete factual record." *Burlington Northern & Santa Fe Ry. v. Bhd. of Maint. of Way Emples., 93 F. Supp. 2d 751, 756 (N.D. Tex. 2000).* "Furthermore, disputes over the legal inferences to be gleaned from the facts in evidence will not prevent summary judgment; thus, where a non-movant merely debates the consequences flowing from admitted facts, summary judgment is proper." *Id.* "Interpretations of statutory provisions that are dispositive and which raise only questions of law, there being no contest as to the operative facts, are appropriate for summary judgment." *United States v. Miller, 2003 U.S. Dist. LEXIS 24884, 2003 WL 23109906, at *3 (N.D. Tex. Dec. 22, 2003).*

With regard to factual issues, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that the movant is entitled to judgment as a matter of law. *See Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994).* "The substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Celotex Corporation v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* The pleadings, depositions, admissions, and affidavits, if any, must demonstrate that no genuine issue of material fact exists. *FED. R. CIV. P. 56(c).*

Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex, 477 U.S. at 323-24.* To carry this burden, the "opponent must do more than simply show ... some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* Instead, the nonmovant must show that the evidence is sufficient to support a resolution of the factual issue in his favor. *Anderson, 477 U.S. at 249.*

While all of the evidence must be viewed in a light most favorable to the motion's opponent, *Anderson, 477 U.S. at 255* (*citing Adickes v. S.H. Kress & Company, 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*), neither conclusory allegations nor unsubstantiated assertions will satisfy the nonmovant's summary judgment burden. *Little v. Liquid Air Corporation, 37 F.3d 1069, 1075 (5th Cir. 1994)* (en banc); *Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.)*, cert. denied, *506 U.S. 825, 121 L. Ed. 2d 46, 113 S. Ct. 82 (1992).* Summary judgment in favor of the movant is proper if, after adequate time for discovery, the motion's opponent fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex, 477 U.S. at 322-23.*

III. ANALYSIS

A. Fair Housing Act, 42 U.S.C. § 3601 et seq.

1. *Section 3604(a)*

The City moves for summary judgment on Plaintiffs' claims of violations of *42 U.S.C. § 3604(a)* of the Fair Housing Act ("FHA"). The City asserts that these claims fail because there has been no refusal to sell or rent to Plaintiffs. (Def.'s Br. at 7.) *Section 3604(a) of the FHA* makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

"To affect the availability of housing within the meaning of the FHA, the discriminatory actions must have a direct impact on plaintiffs' ability, as potential home buyers or renters, to locate in a particular area or to secure housing." *Miller v. City of Dallas, 2002 U.S. Dist. LEXIS 2341, 2002 WL 230834, *13 (N.D. Tex., 2002)* (citing *Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984)*). Courts have construed the phrase "otherwise make unavailable or deny" to encompass actions by individuals or government units that affected the *availability* of housing to minorities. *See e.g. Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1542 (11th Cir. 1994)* (stating that to state a claim under *§ 3604(a)*, plaintiffs must allege unequal treatment on the basis of race that affects the availability of housing); *Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180 (4th Cir. 1999)* (holding that State's decision in selecting location for new highway through predominately African-American neighborhood did not "otherwise make [housing] unavailable"); *Clifton Terrace Assoc., Ltd. v. United Technologies Corp., 289 U.S. App. D.C. 121, 929 F.2d 714 (D.C. Cir.1991)*

(holding that elevator company's refusal to service elevators in buildings in predominantly African-American neighborhood did not "otherwise make [housing] unavailable"); *Edwards v. Johnston County Health Dep't, 885 F.2d 1215 (4th Cir. 1989)* (holding that county's actions in issuing permits for establishment of substandard housing for predominately non-white migrant farm workers did not "otherwise make [housing] unavailable"); *Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984)* (holding that an insurer's refusal to underwrite hazard insurance in a predominately African-American neighborhood did not "otherwise make [housing] unavailable").

In this case, it is undisputed that Plaintiffs own the homes in which they live. (*See* Pl.'s MSJ Br. at 2.) Plaintiffs do not allege that the City has refused to sell or rent to them after the making of a bona fide offer, or has refused to negotiate for the sale or rental of a dwelling to them for any discriminatory reasons. They claim that illegal dumping at the Deepwood site decreased the habitability of their homes and made their homes harder to sell. (*Id.* at 9-10.)

To recover under *§ 3604(a)*, Plaintiffs must prove that the City has made unavailable or denied them dwellings on a prohibited basis. *Section 3604(a)* protects the right of individuals to live where they choose, but it does not protect intangible interests in already-owned property, such as habitability or value. *Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d at 1210*; *see also Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 192-93 (4th Cir. 1999)*. Because no reasonable trier of fact could find that the City made unavailable or denied a dwelling to Plaintiffs within the meaning of the FHA,

the City is entitled to summary judgment with respect to Plaintiffs' claims under *§ 3604(a)*.

2. *Section 3604(b)*

The City also moves for summary judgment on Plaintiffs' claims of discriminatory purpose in the provision of municipal services in violation of *42 U.S.C. § 3604(b)* of the FHA. The City asserts that this claim fails because there has been no refusal to sell or rent to Plaintiffs, Plaintiffs received City services, Plaintiffs have not shown that similarly situated non-minorities were treated differently, and Plaintiffs have not shown that race was a significant factor motivating the City's actions. (Def.'s Resp. Br. at 11-22.) Plaintiffs move for summary judgment on their discriminatory purpose claim, alleging that the City purposefully discriminated against them in the provision of municipal services because of race. (Pl.'s Br. at 29.) Plaintiffs assert that *§ 3604(b)* applies to the provision of municipal services whether or not those services are connected with the sale or rental of a dwelling. (Pl.'s Reply Br. at 5.)

Section 3604(b) of the FHA makes it unlawful "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." *42 U.S.C. § 3604(b)*. To determine whether the scope of *§ 3604(b)* extends beyond the sale or rental of housing, it is necessary to decide whether the language "in connection with" refers to the "sale or rental of a dwelling" or merely the "dwelling" in general. *Laramore v. Illinois Sports Facilities Authority, 722 F. Supp. 443, 452 (N.D. Ill. 2002)*. The majority of courts considering this question

have concluded that the narrower reading of the statute is more appropriate, holding that *§ 3604(b)* applies to only to discrimination which precludes ownership of a dwelling. *See Clifton Terrace Ass. Ltd. v. United Technologies Corp., 289 U.S. App. D.C. 121, 929 F.2d 714, 720 (D.C. Cir. 1991)*; *Halprin v. Prairie Single Family Homes, 208 F. Supp.2d 896, 901 (N.D. Ill. 2002)*; *see also Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984)* (noting that *§ 3604(b)* prohibits discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling); *Laramore, 722 F. Supp. at 452* (finding the narrower reading of *§ 3604(b)* to be the most natural reading of the statute).

In *Clifton Terrace*, the plaintiffs claimed that the failure to service and maintain elevators in a federally subsidized low-income housing complex violated the FHA. *929 F.2d at 716*. The court disagreed and noted that although withholding essential city services in a racially discriminatory manner could have an impact on the use and enjoyment of residential property rights, this did not necessarily mean that such a wrong could be redressed under the FHA. *Id. at 720*. The court found that redress for such action would be available in a suit brought under the *equal protection clause of the Fourteenth Amendment. Id.* The *Clifton Terrace* court specifically stated that *§ 3604(b)*, which addresses habitability, is "limited to services and facilities provided in connection with the sale or rental of housing." *Id.*

In *Halprin*, the court noted that the Seventh Circuit had implicitly adopted the narrow reading of *§ 3604(b)*. *208 F. Supp.2d at 901*. There, the plaintiffs were

homeowners whose home was subjected to attacks due to their religion. *Id. at 898.* The homeowners' association publically supported the threats against the plaintiffs, applied unwanted chemicals to the plaintiffs' yard, and enacted rules targeted at restricting the plaintiffs' use of their home. *Id. at 899.* The court found that because the plaintiffs already owned their home at the time the problems began, they could not state a claim for relief under *§ 3604(b). Id. at 901.* The court noted that the term "services" as used in *§ 3604(b)* applied to "services in connection with the *acquisition* of housing, not its *maintenance.*" *Id.* (emphasis in original) (quoting *N.A.A.C.P. v. Am. Family Mut. Ins. Co., 978 F.2d 287, 299 (7th Cir. 1992)*);

The foregoing cases are consistent with the legislative history of the FHA. The declaration of policy of the FHA states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *42 U.S.C. § 3601.* In commenting upon the import of that declaration, Senator Mondale explained, "Obviously, this *[§ 3601]* is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing.... Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean." 114 Cong. Rec. 4975 (1968).

Plaintiffs cite to the only court which has found that an established homeowner stated a valid claim under *§ 3604(b).* In *Campbell v. City of Berwyn, 815 F. Supp. 1138 (N.D. Ill. 1993),* the plaintiffs purchased a home and were subsequently subjected to racially motivated attacks and threats. After a period of time, 24-hour

police protection of the home was terminated. *Id. at 1141.* The plaintiffs claimed the termination of police protection violated their rights under *§ 3604(b). Id. at 1143.* Although the court recognized that *§ 3604(b)* "prohibits discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling because of race," it ruled that the plaintiffs' allegation was sufficient to state a claim under the statute. *Id. at 1143-44.* However, the *Campbell* court did not specifically address the issue of what effect current ownership of a home would have on a plaintiff's ability to obtain relief under *3604(b).*[2]

This Court follows the weight of authority as set out by those courts which have specifically considered the issue of whether homeowners can state a cause of action under *§ 3604(b)* for the discriminatory provision of services and which is consistent with the legislative history. Accordingly, the Court holds that *§ 3604(b)* applies only to discrimination in the provision of services that precludes the sale or rental of housing. Because Plaintiffs here have not alleged discrimination related to the acquisition of their homes, the City is entitled to summary judgment on Plaintiffs' claims brought under *§ 3604(b).*

B. Housing Regulations, 24 C.F.R. § 100.70(b), (d)(4)

The City asserts that it is entitled to summary judgment on Plaintiffs' claims that the City violated federal housing regulations, *24 C.F.R. § 100.70(b), (d)(4),* because such regulations are not enforceable under *42 U.S.C. § 1983.* (Def.'s Br. at 6-7). Plaintiffs respond that the regulations at issue are enforceable under *§ 1983* as part of the Fair Housing Act. (Pl.'s Resp. at 7.)

Section 1983 provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights ... secured by the Constitution and laws shall be liable to the party injured in an action at law...." *Section 1983* provides a cause of action to redress violations of federal statutes and not solely violations of the Constitution. *Gracia v. Brownsville Housing, 105 F.3d 1053, 1057 (5th Cir. 1997)* (citing *Maine v. Thiboutot, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980)*. However, no cause of action exists where the statute in question does not create enforceable rights, privileges, or immunities within the meaning of *§ 1983. Id.*

Regulations which apply the promulgating statute authoritatively construe the statute. *Alexander v. Sandoval, 532 U.S. 275, 284, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001)*. Accordingly, if the statute itself is enforceable through a private cause of action, the regulations are also enforceable. *Id.* However, regulations which do not simply apply the statute, but instead prohibit conduct which the statute permits, may not be enforced through a private cause of action. *Id. at 285.*

Plaintiffs have asserted a cause of action under *§ 1983* for violations of *24 C.F.R. § 100.70(b), (d)(4)*. The regulations at issue provide that:

> (b) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of

> services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons...
>
> (d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:...
>
> > (4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

24 C.F.R. § 100.70(b),(d)(4). These regulations clearly are intended to apply *42 U.S.C. § 3604(b)*, which provides that: "It shall be unlawful... to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

This Court has previously held that because Plaintiffs own their homes and no reasonable trier of fact could find that the City made unavailable or denied a dwelling to them within the meaning of the FHA, the City is entitled to summary judgment with respect to their claims brought under *§ 3604(a) and (b)* of the FHA. Both the statute and the regulations prohibit discrimination in the provision of housing or the provision of services and facilities in connection with

the provision of housing on the basis of race, color, religion, sex, familial status, or national origin. Even if the Court were to find that the regulations at issue were enforceable through a private cause of action, Plaintiffs' claims fail as a matter of law for the same reason that their claims under the FHA fail. When regulations authoritatively construe a statute, it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." *Sandoval, 532 U.S. at 284.* Because the City is entitled to summary judgment on Plaintiffs' FHA claims, it is also entitled to summary judgment on their claims brought under *42 U.S.C. § 1983* for violations of *24 C.F.R. § 100.70(b), (d)(4).*

C. 42 U.S.C. § 1983: Equal Protection & 42 U.S.C. § 1981

The City claims it is entitled to summary judgment on Plaintiffs' claims of violations of the *Equal Protection Clause of the Fourteenth Amendment* brought under *42 U.S.C. § 1983* and under *42 U.S.C. § 1981* on the ground that Plaintiffs cannot establish an underlying constitutional violation.[3] (Pl.'s MSJ Br. at 11.) Plaintiffs bear the ultimate burden of proof in this case and, to avert summary judgment, they must make a showing of specific facts sufficient to establish the existence of each essential element of their prima facie case. *See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1983).*

1. Standard

To establish a claim of intentional discrimination under *§ 1983* or *§ 1981*, Plaintiffs must first prove a prima facie case of discrimination. *Wallace v. Texas*

Tech University, 80 F.3d 1042, 1047 (5th Cir. 1996). In showing that an official action constitutes a violation of the *Equal Protection Clause*, Plaintiffs must provide proof of racially discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977).* To determine intent, courts consider both circumstantial and direct evidence of intent. *Id.* Where a facially neutral state law has been shown to produce disproportionate effects along racial lines, courts consider the factors set out in *Arlington Heights. Hunter v. Underwood, 471 U.S. 222, 228, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985).* The factors to be considered include: (1) whether the official action "bears more heavily on one race than another;" (2) the historical background of the decision; (3) the sequence of events leading up the challenged decision; (4) departures from the normal procedural sequence; and (5) the legislative or administrative history. *Arlington Heights, 429 U.S. at 265-68.* However, "an action does not violate the *equal protection clause* simply because the decisionmaker knows that it will have a disparate impact on racial or ethnic groups." *United States v. LULAC, 793 F.2d 636, 646 (5th Cir. 1986).* Disproportionate impact of state action on different racial ethnic groups does not of itself violate the Constitution. *Id.* A violation of the *Fourteenth Amendment* occurs "only if a state decisionmaker selects or continues in a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.*

If Plaintiffs provide proof of racially discriminatory intent or purpose, the burden then shifts to the City to provide a legitimate, nondiscriminatory reason for the

actions taken. *Sreeram v. Louisiana State University Medical Center-Shreveport, 188 F.3d 314, 322 (5th Cir. 1999).* If the City can prove it had a legitimate, nondiscriminatory reason for its actions, the presumption of intentional discrimination disappears. *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).* However, Plaintiffs can still prove disparate treatment by offering evidence demonstrating pretext. *Id.*

2. Discriminatory intent or purpose

a. Official action

The City first asserts that the acts complained of are not official actions of the City, a presupposition of the *Arlington Heights* factors. (Pl.'s MSJ Br. at 13.) The City claims that no facts support Plaintiffs' contention that the illegal dumping at the Deepwood site were condoned by the City or were the result of City action. (*Id.*)

The evidence shows that the City issued Certificates of Occupancy to the owners of the Deepwood site which were based on applications indicating the owners' intent to fill the Deepwood site with solid waste, that the City was aware of the illegal dumping at the Deepwood site, that City contractors used the site to dispose of demolition waste, and that the City's efforts to terminate the use of the illegal landfill were sporadic and ineffective. (P.'s MSJ Appx. at 3, 4, 6-21, 111-25, 298.) The Court concludes that Plaintiffs have adduced sufficient evidence to establish that there is a genuine issue of material fact for trial on the question of whether official actions of the City permitted the continued operation of the Deepwood site as an illegal dump.

b. Similarly situated

The City next claims that Plaintiffs cannot show that the City's actions have produced disproportionate effects along racial lines. (Pl.'s MSJ Br. at 14.) Plaintiffs have identified two sites located in predominantly white neighborhoods where the City did remedy illegal dumping and/or illegal mining. (Pl.'s MSJ Br. at 13.) At issue is whether these two sites, the Plainview site and the Middlefield site, were sufficiently similar to the Deepwood site to support the conclusion that similarly situated non-minorities were treated differently.

To establish a prima facie case of disparate treatment, Plaintiffs must show that non-minorities received different treatment under circumstances "nearly identical" to theirs. *Okoye v. University of Texas Houston Health Science Center, 245 F.3d 507, 514 (5th Cir. 2001).* Having reviewed the evidence submitted by both parties in support of their respective motions for summary judgment, the Court concludes that Plaintiffs have submitted sufficient evidence to create a genuine issue of material fact regarding whether the three sites were similarly situated.

c. Discriminatory intent

In addressing whether discriminatory intent can be imputed to the City, the Court must consider the *Arlington Heights* factors. *Hunter, 471 U.S. at 228.* The first *Arlington Heights* factor addresses the discriminatory effect of the official action. With respect to this factor, the City again claims that any discriminatory impact on Plaintiffs was not attributable to official City action. (Def.'s Br. at 16.) However, Plaintiffs have shown that their neighborhood is predominately inhabited by African-Americans and

that the neighborhood has been home to an illegal dump site since 1982. (Def.'s MSJ Br. at 3.) Plaintiffs have adduced sufficient evidence demonstrating a genuine issue of material fact concerning the discriminatory effects of the failure to stop the illegal dumping.

The third *Arlington Heights* factor is the specific sequence of events leading up to the challenged decision. Plaintiffs' evidence shows that after the racial makeup of the neighborhood changed from predominately white to predominately African-American, an application was submitted to the City which clearly stated that the owner of the Deepwood site intended to use the site for solid waste, and a CO was issued on the basis of that application. (Def.'s MSJ. Appx. at 3; Pl's MSJ Appx. at 25.) After the owner of the Deepwood cite was fined in 1983 for operating a sanitary landfill and after receiving numerous citizen complaints, the City determined not to terminate the nonconforming use at the site and allowed the mining operation to continue. (Pl.'s MSJ Appx. at 52, 71.) The City finally sued the owner of the Deepwood site but failed to enforce its judgment against him, which required closure of the site. (*Id.* at 40-46.) Despite the fact that the site had not been cleaned, the City granted a new CO to the new owner of the Deepwood site without first inspecting the premises. (*Id.* at 37.) Subsequently, numerous citations for illegal dumping were issued to the owner of the Deepwood site, and in 1995, the City sued the owner. (*Id.* at 111-25; Def.'s MSJ Appx. at 72-79.) The Court concludes that this sequence of events could permit a reasonable trier of fact to find racially discriminatory intent in the City's failure to stop the illegal dumping.

3. Legitimate, nondiscriminatory reason

Even if Plaintiffs can prove a prima facie case of disparate treatment, the presumption of intentional discrimination disappears if the City can prove it had a legitimate nondiscriminatory reason for its actions. *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).* Here, the City asserts that it did attempt to remedy the illegal dumping at the Deepwood site. (Def.'s MSJ Br. at 14-15.)

Considering the evidence of the City's action with respect to the illegal dumping at the Deepwood site as a whole, the Court concludes there is a genuine issue of material fact whether the City had a legitimate nondiscriminatory reason for its failure to stop the illegal dumping.

4. Municipal liability under *§ 1983*

The City claims that even if Plaintiffs can prove a denial of equal protection, the city is not liable under *§ 1983.* (Def.'s MSJ Br. at 21-32.)

A city may be liable under *§ 1983* if the execution of one of its customs or policies deprives a plaintiff of his constitutional rights. *Monell v. Dep't of Social Serv., 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).* However, liability does not attach merely because a city employed a tortfeasor. *Id. at 694; Campbell v. City of San Antonio, 43 F.3d 973, 977 (5th Cir. 1995).* Municipal liability under *§ 1983* "is limited to action for which the municipality is actually responsible... that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati, 475 U.S. 469, 479-80, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986).* A city's policy or custom must be "the moving force of the constitutional violation." *Palmer v. City of San Antonio, 810 F.2d 514,*

516 (5th Cir. 1987) (quoting *Monell, 436 U.S. at 694*). A single incident, unaccompanied by supporting history, is not a sufficient basis for inferring a custom or policy unless the actors involved were given official policy-making authority. *Worsham v. City of Pasadena, 881 F.2d 1336, 1339-40 (5th Cir. 1989)* (citations omitted); *see also Palmer, 810 F.2d at 516.*

The alleged custom or policy must be adopted by the municipality's governing body before a municipality may be held liable. *See Bennett v. City of Slidell, 728 F.2d 762, 767 (5th Cir. 1984)* (en banc). "Official policy" is defined as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under *§ 1983* unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.) (per curiam), *aff'd in relevant part, 739 F.2d 993 (5th Cir.1984)* (en banc); *Johnson v. Moore, 958 F.2d 92, 94 (5th Cir.1992)* (citing *Bennett v. Slidell, 735 F.2d 861, 862*).

Having reviewed Plaintiffs' evidence concerning the City's action with respect to the illegal dumping at the Deepwood site over the course of almost 30 years, the Court concludes there is a genuine issue of material fact whether the City's failure to terminate the illegal dumping at the Deepwood site was the result of execution of one of its customs or policies.

Considering the evidence of the City's action with respect to the illegal dumping at the Deepwood site as a whole, the Court concludes there is a genuine issue of material fact whether the City discriminated against Plaintiffs on the basis of race. Therefore, the Court denies the City's motion for summary judgment on Plaintiffs' *§ 1983 Fourteenth Amendment* Equal Protection claim and *§ 1981* claim.

D. Damages

The City claims that Plaintiffs may not recover for their requested monetary damages because damages are not recoverable under *§ 1983* or *§ 1981* for personal discomfort and annoyance, Plaintiffs cannot prove a sufficient causal connection to recover for emotional distress and mental anguish, Plaintiffs failed to plead damages for diminution of property values, there is no evidence of a diminution of property values, Plaintiffs have no evidence of time spent monitoring the landfill, and the City is immune from punitive damages under the FHA. (Def.'s MSJ Br. at 33-49.)

The Court has ruled that Plaintiffs may go forward with their *§ 1983 Fourteenth Amendment* Equal Protection claim and *§ 1981* claim. Because the issue of the City's liability under *§ 1983* and *§ 1981* remains to be tried to the Court, and because the parties' briefing with respect to the issue of damages addressed the availability of damages under all of Plaintiffs' claims, the Court declines to reach the damages issue at this stage of the proceedings. Accordingly, summary judgment with respect to Plaintiffs' claim for damages is denied.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that no genuine issue of material fact exists with respect to Plaintiffs' claims brought under *42 U.S.C. § 3604(a) and (b)*, and those claims brought under *42 U.S.C. § 1983* for violations of *24 C.F.R. § 100.70(b), (d)(4)*. Accordingly, *Defendant City of Dallas' Motion for Summary Judgment* is hereby GRANTED, in part and *Plaintiffs' Motion for Partial Summary Judgment* is hereby DENIED.

SO ORDERED, this the 24th day of February, 2004.

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE JUDGE

Footnotes

n1 The background facts are not disputed by the parties.

n2 *Campbell* was cited in dicta in *Miller v. City of Dallas, 2002 U.S. Dist. LEXIS 2341, [WL] (N.D. Tex., Feb. 14, 2002)*, for the proposition that recovery could be had by homeowners under *§ 3604(b)* for

discriminatory provision of services. However, the court expressly noted that the issue of whether relief could be obtained under *§ 3604(b)* was not before it. *2002 U.S. Dist. LEXIS 2341, [WL] at *14.* Subsequent to the decision in *Miller,* the same court which decided *Campbell* issued its decision in *Halprin,* which decisively held that existing homeowners could not recover under *§ 3604(b). 208 F. Supp.2d at 901.*

n3 The City has also moved for summary judgment on the *§ 1981* claim on the ground that it is duplicative of the *§ 1983* claim. (Def.'s MSJ Br. at 21-33.) The City has provided no support for its assertion that a party may not bring a cause of action under different legal theories. Accordingly, summary judgment on this basis is denied.

No. 04-11304
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HAROLD COX; SHIRLEY DAVIDSON; ROBERT STUBBLEFIELD; CYNTHIA HERRING; ELOISE EDWARDS; BETTY CURLEY; LEO EASTER,
Plaintiffs-Appellants,

Versus

CITY OF DALLAS TEXAS; ET AL,
Defendants,

CITY OF DALLAS TEXAS,
Defendant-Appellee.

Filed 12/23/05

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, JONES, and DeMOSS, Circuit Judges.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. App. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Section 3616a of Title 42 of the United States Code provides

a) In general

The Secretary of Housing and Urban Development (in this section referred to as the "Secretary") may make grants to, or (to the extent of amounts provided in appropriation Acts) enter into contracts or cooperative agreements with, State or local governments or their agencies, public or private nonprofit organizations or institutions, or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices, to develop, implement, carry out, or coordinate—

(1) programs or activities designed to obtain enforcement of the rights granted by title VIII of the Act of April 11, 1968 [42 U.S.C.A. §§ 3601 et seq.]

(commonly referred to as the Civil Rights Act of 1968), or by State or local laws that provide rights and remedies for alleged discriminatory housing practices that are substantially equivalent to the rights and remedies provided in such title VIII, through such appropriate judicial or administrative proceedings (including informal methods of conference, conciliation, and persuasion) as are available therefor; and

(2) education and outreach programs designed to inform the public concerning rights and obligations under the laws referred to in paragraph (1).

(b) Private enforcement initiatives

1) In general

The Secretary shall use funds made available under this subsection to conduct, through contracts with private nonprofit fair housing enforcement organizations, investigations of violations of the rights granted under title VIII of the Civil Rights Act of 1968 [42 U.S.C.A. §§ 3601 et seq.], and such enforcement activities as appropriate to remedy such violations. The Secretary may enter into multiyear contracts and take such other action as is

appropriate to enhance the effectiveness of such investigations and enforcement activities.

(2) Activities

The Secretary shall use funds made available under this subsection to conduct, through contracts with private nonprofit fair housing enforcement organizations, a range of investigative and enforcement activities designed to--

(A) carry out testing and other investigative activities in accordance with subsection (b)(1) of this section, including building the capacity for housing investigative activities in unserved or underserved areas;

(B) discover and remedy discrimination in the public and private real estate markets and real estate-related transactions, including, but not limited to, the making or purchasing of loans or the provision of other financial assistance sales and rentals of housing and housing advertising;

(C) carry out special projects, including the development of prototypes to respond to new or

sophisticated forms of discrimination against persons protected under title VIII of the Civil Rights Act of 1968 [42 U.S.C.A. §§ 3601 et seq.];

(D) provide technical assistance to local fair housing organizations, and assist in the formation and development of new fair housing organizations; and

(E) provide funds for the costs and expenses of litigation, including expert witness fees.

(c) Funding of fair housing organizations

(1) In general

The Secretary shall use funds made available under this section to enter into contracts or cooperative agreements with qualified fair housing enforcement organizations, other private nonprofit fair housing enforcement organizations, and nonprofit groups organizing to build their capacity to provide fair housing enforcement, for the purpose of supporting the continued development or implementation of initiatives which enforce the rights granted under title VIII of the Civil Rights Act of 1968 [42 U.S.C.A. §§ 3601 et seq.], as amended. Contracts or cooperative agreements may not provide more than 50 percent of the operating budget of the recipient organization for any one year.

(2) Capacity enhancement

The Secretary shall use funds made available under this section to help establish, organize, and build the

capacity of fair housing enforcement organizations, particularly in those areas of the country which are currently underserved by fair housing enforcement organizations as well as those areas where large concentrations of protected classes exist. For purposes of meeting the objectives of this paragraph, the Secretary may enter into contracts or cooperative agreements with qualified fair housing enforcement organizations. The Secretary shall establish annual goals which reflect the national need for private fair housing enforcement organizations.

(d) Education and outreach

(1) In general

(2)

The Secretary, through contracts with one or more qualified fair housing enforcement organizations, other fair housing enforcement organizations, and other nonprofit organizations representing groups of persons protected under title VIII of the Civil Rights Act of 1968 [42 U.S.C.A. §§ 3601 et seq.], shall establish a national education and outreach program. The national program shall be designed to provide a centralized, coordinated effort for the development and dissemination of fair housing media products, including--

(A) public service announcements, both audio and video;

(B) television, radio and print advertisements;

(C) posters; and

(D) pamphlets and brochures.

The Secretary shall designate a portion of the amounts provided in subsection (g)(4) of this section for a national program specifically for activities related to the annual national fair housing month. The Secretary shall encourage cooperation with real estate industry organizations in the national education and outreach program. The Secretary shall also encourage the dissemination of educational information and technical assistance to support compliance with the housing adaptability and accessibility guidelines contained in the Fair Housing Act Amendments of 1988.

(2) Regional and local programs

The Secretary, through contracts with fair housing enforcement organizations, other nonprofit organizations representing groups of persons protected under title VIII of the Civil Rights Act of 1968 [42 U.S.C.A. §§ 3601 et seq.], State and local agencies certified by the Secretary under section 810(f) of the Fair Housing Act [42 U.S.C.A. §§ 3610(f)], or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices, shall establish or support education and outreach programs at the regional and local levels.

(3) Community-based programs

The Secretary shall provide funding to fair housing organizations and other nonprofit organizations representing groups of persons protected under title

VIII of the Civil Rights Act of 1968, or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices, to support community-based education and outreach activities, including school, church, and community presentations, conferences, and other educational activities.

(e) Program administration

(1) Not less than 30 days before providing a grant or entering into any contract or cooperative agreement to carry out activities authorized by this section, the Secretary shall submit notification of such proposed grant, contract, or cooperative agreement (including a description of the geographical distribution of such contracts) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

(2) Repealed. Pub.L. 104-66, Title I, §§ 1071(d), Dec. 21, 1995, 109 Stat. 720

(f) Regulations

(1) The Secretary shall issue such regulations as may be necessary to carry out the provisions of this section.ine

(2) The Secretary shall, for use during the demonstration authorized in this section, establish guidelines for testing activities funded under the private enforcement initiative of the fair housing

initiatives program. The purpose of such guidelines shall be to ensure that investigations in support of fair housing enforcement efforts described in subsection (a)(1) of this section shall develop credible and objective evidence of discriminatory housing practices. Such guidelines shall apply only to activities funded under this section, shall not be construed to limit or otherwise restrict the use of facts secured through testing not funded under this section in any legal proceeding under Federal fair housing laws, and shall not be used to restrict individuals or entities, including those participating in the fair housing initiatives program, from pursuing any right or remedy guaranteed by Federal law. Not later than 6 months after the end of the demonstration period authorized in this section, the Secretary shall submit to Congress the evaluation of the Secretary of the effectiveness of such guidelines in achieving the purposes of this section.

(3) Such regulations shall include provisions governing applications for assistance under this section, and shall require each such application to contain—

(A) a description of the assisted activities proposed to be undertaken by the applicant, together with the estimated costs and schedule for completion of such activities;

(B) a description of the experience of the applicant in formulating or carrying out programs to prevent or eliminate discriminatory housing practices;

(C) available information, including studies made by or available to the applicant, indicating the nature and extent of discriminatory housing practices occurring in

the general location where the applicant proposes to conduct its assisted activities, and the relationship of such activities to such practices;

(D) an estimate of such other public or private resources as may be available to assist the proposed activities;

(E) a description of proposed procedures to be used by the applicant for monitoring conduct and evaluating results of the proposed activities; and

(F) any additional information required by the Secretary.

(4) Regulations issued under this subsection shall not become effective prior to the expiration of 90 days after the Secretary transmits such regulations, in the form such regulations are intended to be published, to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

(5) The Secretary shall not obligate or expend any amount under this section before the effective date of the regulations required under this subsection.

(g) Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of this section, [FN1] $21,000,000 for fiscal year 1993 and $26,000, 000 for fiscal year 1994, of which--

(1) not less than $3,820,000 for fiscal year 1993 and

$8,500, 000 for fiscal year 1994 shall be for private enforcement initiatives authorized under subsection (b) of this section, divided equally between activities specified under subsection (b)(1) of this section and those

specified under subsection (b)(2) of this section;

(2) not less than $2,230,000 for fiscal year 1993 and $8,500, 000 for fiscal year 1994 shall be for qualified fair housing enforcement organizations authorized under subsection (c)(1) of this section;

(3) not less than $2,010,000 for fiscal year 1993 and $4,000, 000 for fiscal year 1994 shall be for the creation of new fair housing enforcement organizations authorized under subsection (c)(2) of this section; and

(4) not less than $2,540,000 for fiscal year 1993 and $5,000, 000 for fiscal year 1994 shall be for education and outreach programs authorized under subsection (d) of this section, to be divided equally between activities specified under subsection (d)(1) of this section and those specified under subsections (d)(2) and (d)(3) of this section.

Any amount appropriated under this section shall remain available until expended.

(h) Qualified fair housing enforcement organization

(1) The term "qualified fair housing enforcement organization" means any organization that—

(A) is organized as a private, tax-exempt, nonprofit, charitable organization;

(B) has at least 2 years experience in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims; and

(C) is engaged in all the activities listed in paragraph (1)(B) at the time of application for assistance under this section.

An organization which is not solely engaged in fair housing enforcement activities may qualify as a qualified fair housing enforcement organization, provided that the organization is actively engaged in each of the activities listed in subparagraph (B).

(2) The term "fair housing enforcement organization" means any organization that—

(A) meets the requirements specified in paragraph (1)(A);

(B) is currently engaged in the activities specified in paragraph (1)(B);

(C) upon the receipt of funds under this section will become engaged in all of the activities specified in paragraph (1)(B); and

(D) for purposes of funding under subsection (b) of this section, has at least 1 year of experience in the activities specified in paragraph (1)(B).
(i) Prohibition on use of funds

None of the funds authorized under this section may be used by the Secretary for purposes of settling claims, satisfying judgments or fulfilling court orders in any litigation action involving either the Department or

housing providers funded by the Department. None of the funds authorized under this section may be used by the Department for administrative costs.

(j) Reporting requirements

Not later than 180 days after the close of each fiscal year in which assistance under this section is furnished, the Secretary shall prepare and submit to the Congress a comprehensive report which shall contain—

(1) a description of the progress made in accomplishing the objectives of this section;

(2) a summary of all the private enforcement activities carried out under this section and the use of such funds during the preceding fiscal year;

(3) a list of all fair housing enforcement organizations funded under this section during the preceding fiscal year, identified on a State-by-State basis;

(4) a summary of all education and outreach activities funded under this section and the use of such funds during the preceding fiscal year; and

(5) any findings, conclusions, or recommendations of the Secretary as a result of the funded activities.

42 U.S.C.A. §§ 3616a

Section 125.401 of Title 24 of the Code of Federal Regulations provides

(a) The Private Enforcement Initiative provides funding on a single-year or multi-year basis, to investigate violations and obtain enforcement of the rights granted under the Fair Housing Act or State or local laws that provide rights and remedies for discriminatory housing practices that are substantially equivalent to the rights and remedies provided in the Fair Housing Act. Multi-year funding may be contingent upon annual performance reviews and annual appropriations.

(b) Organizations that are eligible to receive assistance under the Private Enforcement Initiative are:

(1) Qualified fair housing enforcement organizations.

(2) Fair housing enforcement organizations with at least 1 year of experience in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims. For the purpose of meeting this 1 year qualification period, it is not necessary that the activities were conducted simultaneously, as long as each activity was conducted for 1 year. It is also not necessary for the activities to have been conducted for a continuous year. An organization may aggregate its experience in each activity over the 2-year period preceding its application to meet this 1 year

qualification period requirement.

Section 100.70 of Title 24 of the Code of Federal Regulations provides, in part

(b) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons.

(4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

Civil Action No. 3:98-CV-1763-BH

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HAROLD COX, et al,
Plaintiffs,

v.

THE CITY OF DALLAS,
Defendant.

Filed 10/02/2003

PLAINTIFFS' REVISED FOURTH AMENDED COMPLAINT

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72. The Dallas City Attorney is a policy-maker for the City of Dallas. The City Attorney has the power to set City policy concerning litigation. "The City attorney shall: ... (10) upon his own initiative or upon the direction of the city council, to appear in any and all litigation affecting the City and to represent the City in such manner as he deems to be to the best interest of the City, and to institute such legal proceedings as may be necessary or desirable on behalf of the City; ..... Dallas City Charter Chapter VII, Sec. 3. (10).

City policy allowing dumping of demolition debris at illegal landfills and racially discriminatory effect of the policy.

73. The City of Dallas implemented a policy that allowed the dumping of demolition debris, including wood, shingles, and other biodegradeable material at illegal landfills by City demolition contractors. The racially discriminatory effect of this City policy is that the illegal landfills used are disproportionately located in minority areas.

74. The City of Dallas City Council approved contracts with demolition contractors to demolish dwelling units in the City of Dallas. The City Council approved both the demolition contractor and the subcontractors for the projects. These City demolition contractors and subcontractors dumped demolition debris from their activities at illegal landfills. The illegal landfills used included the Deepwood illegal dump, the James Currey site at 5000 Wadsworth, and other illegal landfills. These illegal landfills are disproportionately located in minority areas. The City of Dallas City Council continued to approve contracts with the demolition contractors even after the City of Dallas City Attorney had knowledge that the contractors with City Council approved contracts were dumping demolition debris from their activities at the illegal landfills.

75. From 1980 through 1996, the City of Dallas City Council approved demolition contracts with contractors who were using persons or companies to dump demolition debris from City demolitions at the Deepwood site, and at other illegal landfills located in predominantly or majority minority, usually African American, neighborhoods.

76. By 1992, the City of Dallas had established its policy of allowing its demolition contractors and

subcontractors to take the demolition debris to a non-regulated landfill.

77. From 1992 to 1996, the City of Dallas demolished approximately 1,760 residential structures. The majority of the residential structures demolished were located in predominantly African-American neighborhoods. The City allowed the demolition debris from these City instigated demolitions to be disposed of at the Deepwood dump and other illegal landfills in predominantly or majority minority, usually African American, neighborhoods.

78. The City of Dallas paid for the disposal of thousands of truck loads of demolition debris and failed to require proof of disposal of the demolition debris at a legal landfill.

79. The City of Dallas City Council approved demolition contracts and asbestos abatement contracts with Herman Gibbons and the Fruit of the Spirit Services as a subcontractor for those contracts from 1990 through 1996. Mr. Gibbons and the Fruit of the Spirit Services dumped demolition debris at the Deepwood site and was the operator of the illegal Deepwood dump site. The City continued to enter into demolition contracts with full knowledge that Mr. Gibbons would be performing the demolition and disposal work for the contract despite having issued citations to Mr. Gibbons for operating a solid waste landfill at 5003 S. Lamar St. and for illegal dumping at the James Currey site. The City continued to enter into demolition contracts with full knowledge that Mr. Gibbons would be performing the demolition and disposal work for the contract during the period of time when Mr. Gibbons operated

the Deepwood site.

80. In December 1994, the City's Public Works department granted Herman Gibbons permission to fill the Deepwood site. The City granted Mr. Gibbons permission to fill the Deepwood site despite having issued Mr. Gibbons citations for illegal dumping at other illegal landfills in minority areas and with knowledge of illegal dumping at the Deepwood site. The City never revoked the permits granted to Mr. Gibbons to fill the Deepwood property.

81. The City never terminated its contracts with demolition companies who were using Herman Gibbons and the Fruit of the Spirit Services as a subcontractor on City demolition projects during the time that Herman Gibbons operated the illegal solid waste landfill at the Deepwood property during 1995-1996 even though the City knew he was operating the illegal landfill. The City continued to pay its demolition contractors who used Herman Gibbons and Fruit of the Spirit Services as a subcontractor on City demolition projects despite knowledge that Herman Gibbons was operating the illegal Deepwood landfill.

82. The City's implementation of the policy of allowing its demolition contractors and subcontractors to dispose of waste at illegal landfills and at the Deepwood site caused dwelling units to be made unavailable in plaintiffs' predominantly African-American neighborhoods and caused discrimination in the provision of municipal services because of the race of plaintiffs' neighborhood, African-American.

Effects of the City's actions on housing in plaintiffs'

neighborhoods and on plaintiffs.

83. Since at least 1944, the official City of Dallas position as stated in City Council and City Manager approved zoning and land use control ordinances, zoning and land use plans, and zoning and land use studies, has been that single-family residential neighborhoods must be protected from the nuisances and hazards of adjoining or nearby industrial uses. The position as stated in these documents is that the nuisances and hazards of adjoining industrial uses are threats to the public health in the single-family neighborhoods and destroy the viability of the residential neighborhoods by reducing the market demand and thus the value of the homes in those neighborhoods. The position stated in these documents is that the City of Dallas has the obligation to exercise its zoning and land use power to protect every neighborhood in the City from the adverse influences of adjoining industrial uses. The Dallas City Council and the Dallas City Manager have disproportionately failed to use the zoning and land use powers to protect AfricanAmerican single-family and other residential neighborhoods.

84. In 1990, African-Americans constituted 28.9% of the City's population. AfricanAmericans were 47.25% of the total population residing either in or within 500 feet of an industrially zoned area. Whites were 50% of the City's population but were only 24% of the population living in or within 500 feet of an industrially zoned area. The continued interpretation of Specific Use Permit 182 to allow an industrial use, landfilling solid waste, adjacent to plaintiffs' neighborhoods and the refusal, from 1983 to the present, of the Dallas City Council and

the Dallas Board of Adjustment to revoke the Specific Use Permit and to terminate the industrial use is one instance of the discriminatory exercise of the City's zoning and land use control powers. The Dallas City Council and the Dallas City Manager's refusal to take any action to remove or otherwise remedy the solid waste dumping at the Deepwood site or to take any action to eliminate the effects of that dumping on plaintiffs' neighborhoods is one instance of the Dallas City Council's and the Dallas City Manager's disproportionately failure to use the City's zoning and land use powers to protect African-American single-family and other residential neighborhoods.

85. The City of Dallas actions set out above were part of the City's plan to make the land in the area surrounding the Deepwood site unavailable for dwellings. Mr. Gary Seeve, the Assistant Director of Planning for the City of Dallas testified at the Board of Adjustment hearing to the City's plan to change the residential zoning in the area of the Deepwood site from residential single-family R-7.5 zoning to industrial or other more intensive land uses once the Deepwood site was completely filled with solid waste and other material. The City's plan provided that only currently residential area to the east of Jim Miller Road would "perhaps" retain its residential zoning. The City of Dallas zoning ordinance prohibits the presence of dwelling units in industrially zoned areas.

86. The elimination of dwelling units by changing the land to industrial zoning would have caused a direct injury to each plaintiff. The increase of industrial zoned land would have subjected plaintiffs to the increased risk of nuisances and hazards from incompatible, nearby

and adjacent industrial uses. The increase of industrial zoned land would have injured plaintiffs by decreasing the market demand for their homes and thus decreasing their property values.

87. The effect of the City's actions encouraging, supporting, and allowing the illegal dumping has had the same effect on the availability of dwellings as the planned industrial zoning would have had. The vacant land in the area has been made unavailable for dwelling units because the nuisance and hazardous conditions at the Deepwood site make the land unsuitable for dwelling units. The lack of new residential development in the area has contributed to the decline in the property values of plaintiffs and to the decline in the viability of their neighborhoods. The City of Dallas admits in planning and policy documents that the presence of adjoining industrial or other nuisance conditions that discourage the development of new dwelling units in the area leads to a decline in single-family home values for the properties already present.

88. The City's actions directly affect the availability of the existing dwelling units in plaintiffs' neighborhoods by interfering with the owners' ability to make the dwelling units available to others by selling the dwelling units. The illegal dumping and the presence of the Deepwood site subject plaintiffs to a form of mortgage redlining whereby their ability to make their dwellings available for sale is decreased. For example, Federal Housing Administration (FHA) mortgage appraisal guidelines require the appraiser to identify all inharmonious land uses that present a serious detriment to either the health or safety of the occupants or to the economic security of the property,

note such detriments, and recommend that the property be rejected by the lender. Adjoining or nearby hazards such as chemical fumes, odors that are hazardous to the health of neighborhood occupants and adversely affect the market value of the property require the appraiser to return the unfinished appraisal to the lender. Without a finished appraisal, the loan cannot be approved.

89. The City's actions, by making the neighborhoods undesirable because of the nuisance and hazardous conditions, has injured plaintiffs by reducing the market demand for their properties. This has the effect of reducing their property values and causing a decline in the stability and viability of their neighborhoods

90. The City's actions, by subjecting plaintiffs to the nuisance and hazardous conditions of the illegal dumping and the continued nuisance and hazardous conditions of the open dumps, have caused plaintiffs the annoyance and discomfort of enduring the nuisance and hazardous conditions.

91. The City's actions have required the plaintiffs to take the time and incur the expenses of attempting to convince the City to stop the illegal dumping and to eradicate the effects of the illegal dumping.

92. The City's actions have subjected plaintiffs to the emotional harm caused by knowing that their race and color and the race and color of their neighbors were the basis for the City's actions.

93. The protections provided for single-family zoned neighborhoods in the City's zoning code and by the City's implementation of the zoning code are basic City

services that promote health, safety, morals, and the general welfare by securing safety from hazards, limiting the presence of adverse uses to the areas of the City suitable for those uses, and conserving property values. City of Dallas Development Code, § 51A-1.102(b).

94. The City of Dallas zoning code is a law providing for the security of persons and property. The City of Dallas's implementation of its zoning code is a proceeding for the security of persons and property.City of Dallas Development Code, § 51A-1.102(b).

95. The City actions set out in this complaint have denied plaintiffs the full and equal benefit of laws and proceedings for the security of persons and property as is enjoyed by white citizens of the City of Dallas.

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